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No. 08-423

In The

Supreme Court of the United States

TIMOTHY AND ANDREA SPACHT, Individually and as Next Friend of N.S., a Minor,

Petitioners,

v.

DR. WENDY A. TROYER, DR. WILLIAM G. KEYES, DR. JAMES THOMSEN, DR. VERLIA GOWER,

Respondents.

On Petition For A Writ Of Certiorari To The Georgia Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a Georgia trial court judge has authority, on its own initiative, to dismiss a medical malpractice complaint on an issue that was forfeited by defendant when it was not raised in a motion to dismiss, depriving a plaintiff of full and fair notice and an opportunity to respond.

2. Whether the trial court or Court of Appeals erred in finding Dr. Schwartz's Affidavit insufficient, even under their own flawed procedural hearings.

3. Whether the Georgia Court of Appeals erred in concluding that an expert's testimony which is found to be inadmissible at trial under *Daubert* results in dismissal of the entire case when there is unrebutted expert testimony on the record.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all parties appearing here and before the Georgia Court of Appeals and Georgia Supreme Court:

Petitioners here and Appellants below are:

Spacht's as set forth in style of case.

Respondents here and Respondents below are:

Dr. Wendy A. Troyer, Dr. William G. Keyes, Dr. James Thomsen and Dr. Verlia Gower.

Dr. Theodore Brand and Dr. John Bleacher are not Respondents here but were parties to the proceedings below.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	iii
Table of Appendices	iv
Table of Authorities	vi
Opinions Below	1
Jurisdiction	1
Constitutional Provisions and Statutes Involved	1
Statement of the Case	10
A. Factual Background	14
B. Proceedings Below	24
C. When Constitutional Issue Raised	25
Reasons for Granting Certiorari	25
I. The trial court's sua sponte dismissal of Petitioners' complaint deprived Petitioners of notice and an opportunity to respond	27
II. The Court of Appeals found that the trial court did not err in its conclusion that Dr. Schwartz was not competent to give an affidavit in this case. Specifically, the Court of Appeals found that the record was silent as to when within the last thirty years Dr. Schwartz had diagnosed the condition at issue. However, Dr. Schwartz's Affidavit testimony is more than sufficient to qualify him under any standard, even under the tortured reasoning of the trial court and the Court of Appeals	30

TABLE OF CONTENTS – Continued

Page

III. If a *Daubert* hearing was conducted, the Court of Appeals erred in concluding that an expert's testimony which is found to be inadmissible at trial under *Daubert* results in dismissal of the case when there is unrebutted expert testimony on the record 33

Conclusion 35

APPENDIX

Court of Appeals of Georgia decision, Spacht et al. v. Troyer et al., dated November 30, 2007 ..... App. 1

Pre-Hearing Order on Defendants' Motions to Dismiss and Plaintiffs' Motion for Protective Order, dated July 28, 2006 and signed by Judge Gail C. Flake, Dekalb Superior Court .. App. 17

Post-Hearing Order on Defendants' Motions to Dismiss and on Plaintiffs' Motion to Supplement Affidavit, dated December 22, 2006 and signed by Judge Joan Roach, by designation, Dekalb Superior Court ..... App. 39

Court of Appeals' Order to have case decided by the Second Division, the Third Division and a seventh judge due to dissent within the Second Division, dated November 29, 2007 ..... App. 60

Order denying Motion for Full Court Review in the Court of Appeals of Georgia dated December 14, 2007 ..... App. 62

TABLE OF CONTENTS – Continued

Page

Order denying Motion for Reconsideration in the Court of Appeals of Georgia dated December 14, 2007 ..... App. 63

Order denying Petition for Certiorari in the Supreme Court of Georgia, dated May 19, 2008 ..... App. 64

Order denying Motion for Reconsideration in the Supreme Court of Georgia, dated June 30, 2008 ..... App. 65

TABLE OF AUTHORITIES

Page

CASES

Abramson v. Williams, 281 Ga. App. 617, S.E. 2d 765 (2007) 23, 28, 30

BMW of North America v. Gore, 517 U.S. 559 (1996) 27

Cotten v. Phillips, 280 Ga. App. 280, 633 S.E. 2d 655 (2006) ..... *passim*

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) 6

General Electric Co. v. Joiner, 522 U.S. 136 (1997) 6

Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137 (1999) 6

MCG Health v. Barton, 285 Ga. App. 577, 647 S.E. 2d 201 (2007) 30, 31

Mays v. Ellis, 283 Ga. App. 195, 647 S.E. 2d 201 (2007) 30

Milligan v. Manno, 197 Ga. App. 171 (1990) 19, 20

Sandford v. Howard, 161 Ga. App. 495 (1982) 19, 20

Spacht v. Troyer, 288 Ga. App. 898, 655 S.E. 2d 656 1

Tenet Healthcare Corp. v. Gilbert, 277 Ga. App. 895 (2006) 12

Thomas v. American Home Products, 519 U.S. 913 (1996) 35

TABLE OF AUTHORITIES – Continued

Page

STATUTES

O.C.G.A. § 9-2-61 9
O.C.G.A. § 9-11-9.1 ..... *passim*
O.C.G.A. § 9-11-9.1(a) 6
O.C.G.A. § 9-11-9.1(b) 7
O.C.G.A. § 9-11-9.1(c) 8
O.C.G.A. § 9-11-9.1(d) 8
O.C.G.A. § 9-11-9.1(e) 8
O.C.G.A. § 9-11-9.1(f) 9
O.C.G.A. § 9-11-9.1(g) 9
O.C.G.A. § 9-11-15 8
O.C.G.A. § 9-11-16 5
O.C.G.A. § 24-9-67.1 ..... 2, 10, 14, 17, 30
O.C.G.A. § 24-9-67.1(a) 2
O.C.G.A. § 24-9-67.1(b) 2
O.C.G.A. § 24-9-67.1(c) 3, 11, 19, 20, 26
O.C.G.A. § 24-9-67.1(c)(1) 3
O.C.G.A. § 24-9-67.1(c)(2) 3, 18, 19, 23
O.C.G.A. § 24-9-67.1(d) ..... *passim*
O.C.G.A. § 24-9-67.1(e) 5
O.C.G.A. § 24-9-67.1(f) 5

OPINION BELOW

The Opinion of the Georgia Court of Appeals is reported at *Spacht v. Troyer*, 288 Ga. App. 898, 655 S.E. 2d 656 and is reprinted in the Appendix to this Petition at 1. The opinion of the trial court is not reported. It is reprinted in the Appendix to this Petition at 39. The Georgia Supreme Court's denial of the petition for certiorari is reprinted at the Appendix to this Petition at 64. The Georgia Supreme Court's denial of the Motion for Reconsideration is reprinted in the Appendix to this Petition at 65.

JURISDICTION

This petition for a writ of certiorari is filed within 90 days of the date of the Supreme Court of Georgia's denial of the motion for reconsideration herein. Jurisdiction is invoked and conferred by 28 U.S.C. §§ 1257, 2101(c) and 2104. The judgment is plainly final and is not subject to further review in the state courts.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

O.C.G.A. § 24-9-67.1 provides:

(a) The provisions of this Code section shall apply in all civil actions. The opinion of a witness qualified as an expert under this Code section may be given on the facts as proved by other witnesses. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing or trial. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

(b) If scientific, technical, or other specialized knowledge will assist the trier of fact in any cause of action to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if:

(1) The testimony is based upon sufficient facts or data which are or will be admitted into evidence at the hearing or trial;

(2) The testimony is the product of reliable principles and methods; and

(3) The witness has applied the principles and methods reliably to the facts of the case.

(c) Notwithstanding the provisions of subsection (b) of this Code section and any other provision of law which might be construed to the contrary, in professional malpractice actions, the opinions of an expert, who is otherwise qualified as to the acceptable standard of conduct of the professional whose conduct is at issue, shall be admissible only if, at the time the act or omission is alleged to have occurred, such expert:

(1) Was licensed by an appropriate regulatory agency to practice his or her profession in the state in which such expert was practicing or teaching in the profession at such time; and

(2) In the case of a medical malpractice action, had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:

(A) The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in

performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; or

(B) The teaching of his or her profession for at least three of the last five years as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in teaching others how to perform the procedure, diagnose the condition, or render the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; and

(C) Except as provided in subparagraph (D) of this paragraph:

(i) Is a member of the same profession;

(ii) Is a medical doctor testifying as to the standard of care of a defendant who is a doctor of osteopathy; or

(iii) Is a doctor of osteopathy testifying as to the standard of care of a defendant who is a medical doctor; and

(D) Notwithstanding any other provision of this Code section, an expert who is a physician and, as a result of having, during at least three of the last five (5) years immediately preceding the time the act or omission is alleged to have occurred, supervised,

taught, or instructed nurses, nurse practitioners, certified registered nurse anesthetists, nurse midwives, physician's assistants, physical therapists, occupational therapists, or medical support staff, has knowledge of the standard of care of that health care provider under the circumstances at issue shall be competent to testify as to the standard of that health care provider. However, a nurse, nurse practitioner, certified registered nurse anesthetist, nurse midwife, physician's assistant, physical therapist, occupational therapist, or medical support staff shall not be competent to testify as to the standard of care of a physician.

(d) Upon motion of a party, the court may hold a pretrial hearing to determine whether the witness qualifies as an expert and whether the expert's testimony satisfies the requirements of subsections (a) and (b) of this Code section. Such hearing and ruling shall be completed no later than the final pretrial conference contemplated under *Code Section 9-11-16*.

(e) An affiant must meet the requirements of this Code section in order to be deemed qualified to testify as an expert by means of the affidavit required under *Code Section 9-11-9.1*.

(f) It is the intent of the legislature that, in all civil cases, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other

states. Therefore, in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.

O.C.G.A. § 9-11-9.1 provides:

(a) In any action for damages alleging professional malpractice against:

(1) A professional licensed by the State of Georgia and listed in subsection (g) of this Code section;

(2) A domestic or foreign partnership, corporation, professional corporation, business trust, general partnership, limited partnership, limited liability company, limited liability partnership, association, or any other legal entity alleged to be liable based upon the action or inaction of a professional licensed by the State of Georgia and listed in subsection (g) of this Code section; or

(3) Any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of Georgia and listed in subsection (g) of this Code section, the plaintiff shall be required to file with the complaint an affidavit

of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim.

(b) The contemporaneous affidavit filing requirement pursuant to subsection (a) of this Code section shall not apply to any case in which the period of limitation will expire or there is a good faith basis to believe it will expire on any claim stated in the complaint within ten days of the date of filing the complaint and, because of time constraints, the plaintiff has alleged that an affidavit of an expert could not be prepared. In such cases, if the attorney for the plaintiff files with the complaint an affidavit in which the attorney swears or affirms that his or her law firm was not retained by the plaintiff more than 90 days prior to the expiration of the period of limitation on the plaintiff's claim or claims, the plaintiff shall have 45 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court shall not extend such time for any reason without consent of all parties. If either affidavit is not filed within the periods specified in this Code section, or it is determined that the law firm of the attorney who filed the affidavit permitted in lieu of the contemporaneous filing of an expert affidavit or any attorney who appears on the pleadings was retained by the plaintiff more than 90 days prior to the expiration of the period of limitation, the complaint shall be dismissed for failure to state a claim.

(c) This Code section shall not be construed to extend any applicable period of limitation, except that if the affidavits are filed within the periods specified in this Code section, the filing of the affidavit of an expert after the expiration of the period of limitations shall be considered timely and shall provide no basis for a statute of limitations defense.

(d) If a complaint alleging professional malpractice is filed without the contemporaneous filing of an affidavit as permitted by subsection (b) of this Code section, the defendant shall not be required to file an answer to the complaint until thirty (30) days after the filing of the affidavit of an expert, and no discovery shall take place until after the filing of the answer.

(e) If a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed on or before the close of discovery, that said affidavit is defective, the plaintiff's complaint shall be subject to dismissal for failure to state a claim, except that the plaintiff may cure the alleged defect by amendment pursuant to *Code Section 9-11-15* within thirty (30) days of service of the motion alleging that the affidavit is defective. The trial court may, in the exercise of its discretion, extend the time for filing said amendment or response to the motion, or both, as it shall determine justice requires.

(f) If a plaintiff fails to file an affidavit as required by this Code section and the defendant raises the failure to file such an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, such complaint shall not be subject to the renewal provisions of *Code Section 9-2-61* after the expiration of the applicable period of limitation, unless a court determines that the plaintiff had the requisite affidavit within the time required by this Code section and the failure to file the affidavit was the result of a mistake.

(g) The professions to which this Code section shall apply are:

(1) Architects;

(2) Attorneys at law;

(3) Audiologists;

(4) Certified public accountants;

(5) Chiropractors;

(6) Clinical social workers;

(7) Dentists;

(8) Dietitians;

(9) Land surveyors;

(10) Marriage and family therapists;

(11) Medical doctors;

(12) Nurses;

(13) Occupational therapists;

(14) Optometrists;

(15) Osteopathic physicians;

(16) Pharmacists;

(17) Physical therapists;

(18) Physicians' assistants;

(19) Podiatrists;

(20) Professional counselors;

(21) Professional engineers;

(22) Psychologists;

(23) Radiological technicians;

(24) Respiratory therapists;

(25) Speech-language pathologists; or

(26) Veterinarians.

STATEMENT OF THE CASE

On February 16, 2005, Act No. 1 of the 2005 Georgia General Assembly was signed into law, putting into place the most far-reaching legislative changes in Georgia's civil justice system since the passage of the Civil Practice Act in 1966. The act created a new code section designated O.C.G.A. § 24-9-67.1, which imposed conditions an expert was

required to meet in order to be allowed to testify in any civil action.

O.C.G.A. § 9-11-9.1 was amended as part of the same omnibus bill that enacted O.C.G.A. § 24-9-67.1. O.C.G.A. § 9-11-9.1 requires that an action for medical malpractice be accompanied by an affidavit of an expert competent to testify. An expert in a medical malpractice case must be competent under O.C.G.A. § 24-9-67.1(c) to give an affidavit as required under O.C.G.A. § 9-11-9.1.

A challenge to the sufficiency of an affidavit must be raised by the defendant to whom it pertains, with specificity, in a motion to dismiss. Prior to the amendment of O.C.G.A. § 9-11-9.1, the defendant was required to allege the defect with specificity in a motion to dismiss filed *contemporaneously* with their initial responsive pleading. O.C.G.A. § 9-11-9.1 as amended requires that the defendant allege the defect with specificity in a motion to dismiss filed *on or before the close of discovery*. Under both versions, Plaintiff is given a *mandatory* thirty (30) days from service of the *mandatory motion to dismiss* to cure the defect *as specified by the defendant* by amendment or response to the motion. The trial court's discretion is limited to extending the time for filing the amendment or response to the motion, or both.

O.C.G.A. § 9-11-9.1 does not give, and has never given, the trial court discretion to consider issues pertaining to the sufficiency of an affidavit when the issue is not timely raised by a defendant in a motion

to dismiss. An issue not timely raised by a defendant in a motion to dismiss is forfeited. *Tenet Healthcare Corp. v. Gilbert,* 277 Ga. App. 895 (2006).

In this medical malpractice case however, the trial court dismissed Petitioners' complaint for failure to state a claim for an insufficient affidavit on its own initiative, on an issue never raised by any of the respondents below, and incorrectly deciding the unraised issue. Petitioners were deprived of notice and an opportunity to respond as required under O.C.G.A. § 9-11-9.1 and as guaranteed by the United States Constitution. The first time that Petitioners had notice of the issue was in the trial court's order dismissing this case.

The trial court's sua sponte dismissal of Petitioners' complaint on an issue not before it clearly deprived Petitioners of full and fair notice and an opportunity to respond, and the flawed, incoherent and muddled reasoning of the trial court, which was subsequently affirmed by the Court of Appeals in its own flawed opinion, is astonishing, particularly because the Court of Appeals, which original three-judge (3) panel was in favor of reversal 2-1, affirmed the decision in the space of twenty-four (24) hours after adding four (4) judges as set forth as follows.

Under the procedures of the Court of Appeals, our judges sit in three-judge (3) panels. Cases are assigned to individual judges who author the proposed opinion and circulate it to the remaining two judges on the panel. If either of the two reviewing judges on

the panel has a different view from that of the author, such position is reduced to writing. If such writing would result in a different judgment line, the writing becomes a dissent and circulates "whole court." If the writing would not result in a different judgment line, then the writing becomes a "special concurrence" and the case does not circulate outside the panel.

The original three (3) judge panel had this case under consideration for seven (7) months. There was a dissent on the panel, 2-1 in favor of reversal. Because there was a dissent on the panel, four additional judges were added to the panel to create a seven (7) judge panel. In the space of twenty-four (24) hours, the four additional judges joined the original dissenting opinion and affirmed the trial court's sua sponte dismissal of this medical malpractice case.

The Court of Appeals ignored the explicit due process requirements under O.C.G.A. § 9-11-9.1. A challenge to the sufficiency of an expert affidavit must be raised by the defendant with specificity in a motion to dismiss. Plaintiff is then given thirty (30) days from service of the motion to dismiss to amend the affidavit or respond to the motion. The trial judge has discretion to extend the time to respond, but has no authority to dismiss a complaint for an insufficient affidavit sua sponte.

Furthermore, the tortured reasoning of the trial court does not authorize dismissal of this lawsuit. This is a case where clear medical malpractice was proven against the respondents. This is a case where

malpractice was established not only by the affidavit of Petitioners' expert, Dr. Schwartz but also the deposition testimony of N.S.'s treating physician, Dr. Kanter. But that was missed by the four (4) new Court of Appeals judges because they obviously did not read the entire record in twenty-four (24) hours.

Review is urgently needed, not only because Petitioners' due process rights have been violated, but because Petitioners deserve to have a meaningful review of this case. The trial court had no authority to dismiss this case on an issue not before it, but the Court of Appeals' decision to affirm within the space of twenty-four (24) hours, was ill-informed and incorrect, and has left Petitioners with no further recourse. Everything is on the line for Petitioners. Left undisturbed, the sua sponte dismissal that was affirmed by the Court of Appeals under 24-9-67.1 will inevitably lead to the unconstitutional application of O.C.G.A. § 24-9-67.1 and O.C.G.A. § 9-11-9.1 for other plaintiffs in Georgia.

A. Factual Background

This is a case where medical malpractice was proven against respondents. Petitioners' expert, Dr. Schwartz, is a board certified pediatric surgeon, qualified to testify by affidavit, and N.S.'s own treating physician, Dr. Kanter, has given a deposition on his behalf establishing medical negligence against the respondents. The testimony of Dr. Schwartz and

Dr. Kanter establishes a prima facie case against Respondents.

Petitioner N.S. was born with severe upper airway obstruction. The cause was unknown. A tracheostomy tube was placed in his throat so he could breathe. When he was two and a half (2½) months old, a CT scan of his neck was performed. The results definitively established the cause of his airway obstruction. N. was born with a vascular ring. The ring was encircling his trachea and esophagus causing him to be unable to breathe. All symptomatic vascular rings are surgically divided. This is the only form of treatment for a symptomatic vascular ring.

Respondents were N.S.'s physicians. None bothered to read the results of the CT scan. Dr. Keyes ordered the CT scan. He *admits* that he never bothered to read it. Dr. Troyer admitted N. into the hospital on the day of his CT scan. She *admits* that she never bothered to read the results. Dr. Thomsen kept in place an unnecessary tracheostomy tube because he *never* bothered to read his own patient's CT scan. Dr. Gower unnecessarily removed N.' salivary glands because she *never* bothered to read her own patient's CT scan.

As a result, N.S. lived with a tracheostomy tube in place 24 hours a day for the first two and a half (2½) years of his life. His salivary glands were removed, which will cause him problems for the rest of his life. None of it was necessary. If respondents had just reviewed the definitive results of the CT scan,

the diagnosis of a vascular ring would have been made and N. would have been referred to a surgeon for division of the vascular ring.

When N. was four (4) years old, his parents went to talk with Dr. Kanter, his cardiothoracic surgeon. Dr. Kanter is a board certified pediatric cardiothoracic surgeon, and chief of pediatric cardiothoracic surgery at Children's Hospital and tenured professor at Emory University School of Medicine. Dr. Kanter saved N.S.'s life and has testified on his behalf in this case.

Dr. Kanter testified that he ordered a CT scan to rule out the possibility of a vascular ring before he was to perform N.' heart surgery. (Deposition of Dr. Kanter p. 13). The radiologist informed Dr. Kanter that a CT scan had already been taken. Id. Dr. Kanter reviewed the "old CT scan" and diagnosed the vascular ring immediately. (Deposition of Dr. Kanter p. 14). In fact, Dr. Kanter testified that "I think that that report is screaming out vascular ring." (Deposition of Dr. Kanter p. 24).

Dr. Kanter surgically divided the vascular ring, based on the CT scan that had been performed years earlier. (Deposition of Dr. Kanter p. 33). Dr. Kanter testified that N.' respiratory problems were related to the vascular ring and opined that N. would not have ever needed a tracheotomy if he had the vascular ring relieved. (Depo. p. 34). Of course, because none of the doctors bothered to read the CT scan, the diagnosis

was missed until Dr. Kanter reviewed the "old CT scan" and made the diagnosis years later.

According to Dr. Kanter, a physician must review the tests that he orders for a patient. (Depo. p. 22). Here, Dr. Keyes ordered the "old CT scan" for N., but never bothered to review it. Dr. Kanter opined that the failure to review the results of a diagnostic test is a deviation of the standard of care. (Depo. p. 29). Therefore, Dr. Kanter established that Dr. Keyes was negligent in failing to review the results of a test that he ordered. Dr. Kanter further opined that a physician must review the diagnostic tests of his patient and must familiarize himself with the child's conditions. (Depo. p. 24). Here however, Dr. Troyer, Dr. Thomsen and Dr. Gower all failed to review the "old CT scan" for N.S., and therefore the diagnosis of a vascular ring was missed. Dr. Kanter testified that there is no reason that this diagnostic test should not have been discovered and reviewed when taken. (Depo. p. 36-37). Therefore, Dr. Kanter established medical negligence on behalf of Drs. Troyer, Thomsen, Keyes and Gower. Dr. Kanter testified that the tracheotomy would never have been needed had the vascular ring been relieved. (Depo. p. 34).

Petitioners' medical malpractice complaint was filed contemporaneously with the Affidavit of Dr. David Schwartz in accordance with O.C.G.A. § 9-11-9.1 and 24-9-67.1. Dr. David Schwartz is a board certified Pediatric Surgeon and Fellow of the American College of Surgeons and American Academy of

Pediatrics, having received his M.D. degree from Albert Einstein School of Medicine and having performed his pediatric surgery residency and fellowship at Johns Hopkins Hospital. Dr. Schwartz has actively practiced as a pediatric surgeon continuously for more than thirty-five (35) years. Dr. Schwartz testified in his affidavit that as a pediatric surgeon, he manages surgical problems in children every day. He testified that he has the training, knowledge, and experience to diagnose and surgically manage children with vascular rings. Based on his expertise as a pediatric surgeon, Dr. Schwartz opined (1) Dr. Troyer and Dr. Keyes failed to review the results of N.S.'s March 12, 2003 CT scan which definitely established that N.S. suffered from a vascular ring. (R-31-33; R-1298-1307). (2) Dr. Gower negligently failed to review the March 12, 2002 CT which definitely established that N.S. suffered from a vascular ring. As a result, she unnecessarily removed N.S.'s salivary gland. Id. (3) Dr. Thomsen kept in place an unnecessary tracheotomy. The tracheotomy would have been avoided if Dr. Thomsen diagnosed the vascular ring. Id.

The Respondents filed motions to dismiss for an insufficient affidavit on the sole issue of whether Dr. Schwartz was required to practice in the same specialty as them under 24-9-67.1(c)(2) to be competent to testify by affidavit under 9-11-9.1. His competence as a pediatric surgeon, the basis for his opinions and the reliability of his testimony, was never challenged by any party to the lawsuit.

O.C.G.A. § 24-9-67.1(c)(2) requires that an expert testifying in a medical malpractice case have "actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given." Respondents argued that this language required the expert to be a specialist in the same specialty as the defendant doctor. Dr. Keyes and Dr. Troyer are neonatologists. They argued that Dr. Schwartz was not competent under O.C.G.A. § 24-9-67.1(c) because he was not a neonatologist. Dr. Thomsen and Dr. Gower are pediatric otolaryngologists. They argued that Dr. Schwartz was not competent under O.C.G.A. § 24-9-67.1(c) because he was not a pediatric otolaryngolgist.

On July 28, 2006, the trial court judge entered a fifteen (15) page Order reserving ruling on the issues raised by respondents in their Motions to Dismiss. The trial court opined that it could not determine from the record whether Dr. Schwartz was qualified due to all the various specialties and subspecialties involved. The trial court cited to *Milligan v. Manno*, 197 Ga. App. 171 (1990), which held that as a general rule, a member of a school of practice other than that to which defendant belongs is not competent to testify as an expert, and to *Sandford v. Howard*, 161 Ga. App. 495 (1982), which held that an exception to the general rule existed where there was proof that the methods of treatment were the same despite the different schools involved, and determined it would conduct a hearing under O.C.G.A. § 24-9-67.1(d) to determine whether Dr. Schwartz was competent to

testify against the defendant doctors despite the different specialties involved.

The trial court's pre-hearing Order was wrong in four fundamental ways, even though a ruling had not yet been made.

First, *Milligan v. Manno*, 197 Ga. App. 171 and *Sandford v. Howard*, 161 Ga. App. 495 were no longer good law. Exactly twenty-two (22) days before the pre-hearing order had been entered, the Court of Appeals decided *Cotten v. Phillips,* 280 Ga. App. 280, 633 S.E. 2d 655 (2006), which made clear that the language in 24-9-67.1(c) did not require that an expert practice in the same specialty as the negligent defendant doctor or make a showing of similar treatment. The Court held that O.C.G.A. § 24-9-67.1(c)

> "simply requires that an expert have actual professional knowledge and experience in the area of practice/specialty in which his expert opinion is to be given. It appears that the legislature has allowed for an overlap in specialties, whereby an otherwise qualified medical doctor belonging to 'Specialty A' can render an opinion about the acts or omissions of another medical doctor belonging to 'Specialty B' – so long as the opinion of the expert witness belonging to 'Specialty A' pertains to Specialty A. . . . "

Under the *Cotten v. Phillips* decision, the Spacht's were not required to prove that the methods of treatment were the same for their expert and the defendant doctors. The expert was simply required to

have experience in the area in which his opinion was given. Here, Dr. Schwartz gave an opinion in the area of pediatric surgery and he is a qualified and experienced pediatric surgeon. A vascular ring is a surgical problem that affected a pediatric patient in this case. He is the doctor that respondents should have referred N. to for division of the ring. He testified in his affidavit that he has been in private practice as a pediatric surgeon for over thirty (30) consecutive years and has been diagnosing and surgically managing vascular rings for over thirty (30) years. Clearly, he has knowledge and experience in the area of practice in which his opinion was given.

Second, the issue raised by respondents was rendered moot by *Cotten v. Phillips*. A hearing should not have been scheduled or conducted. The sole issue raised by respondents in their motions to dismiss was moot and there were no other issues pending before the court. The Motions to Dismiss should have been denied, not reserved.

Third, O.C.G.A. § 24-9-67.1(d) hearings are evidentiary hearings based on *Daubert* principles of reliability and scientific validity. There were no *Daubert* issues before the Court. The hearing was simply a hearing on the Motions to Dismiss based on the sole issue raised by respondents.

Fourth, under O.C.G.A. § 24-9-67.1(d), a *Daubert* hearing must be requested on motion of a party. No motion for a *Daubert* hearing under O.C.G.A. § 24-9-67.1(d) was filed by any party in this case.

To point out that the issue was moot and to further assist the court, Petitioners filed a motion to supplement and the supplemental Affidavit of Dr. Schwartz on September 18, 2006. The motion to supplement informed the court that an expert was not required to have knowledge and experience in or to actively practice in the same area of practice or specialty as that of the defendant doctor. *Cotten v. Phillips*, 280 Ga. App. 280, 633 S.E. 2d 655 (2006). This rendered the sole issue raised by defendants in their motions moot.

The Affidavit of Dr. Schwartz was also supplemented to include the scope of his knowledge and experience as a pediatric surgeon. Specifically, Dr. Schwartz testified that as a pediatric surgeon, he operates on children whose development ranges from the newborn stage to the teenage years. He testified that as a pediatric surgeon, he is primarily concerned with the diagnosis, preoperative, operative, and postoperative management of surgical problems in children. He testified that as a board certified pediatric surgeon, he has the training, knowledge and experience to diagnose and surgically manage children with vascular rings. He testified that every day he cooperates with all of the specialists involved in a child's medical care to determine whether surgery is the best option.

He testified that he regularly cooperates with neonatologists and pediatric otalyrngologists to manage surgical problems in children. He testified that a child with a vascular ring must be diagnosed

immediately by a neonatologist and or pediatric otolaryngologist and then they must refer the child to a pediatric surgeon so that the pediatric surgeon may immediately evaluate the child for surgical division of the ring.

Respondents presented no evidence to contradict the affidavit testimony of Dr. Schwartz. Dr. Schwartz's testimony that he has the training, knowledge and experience to diagnose vascular rings was unrebutted.

On September 21, 2006, the matter came before the Honorable Judge Roach, a DeKalb County Magistrate Court Judge, (specially designated by the Honorable Judge Gail Flake to sit as Superior Court Judge at the hearing). Both sides presented argument on the sole issue that was outlined by the order dated July 28, 2006. To wit: whether O.C.G.A. § 24-9-67.1(c)(2), which reads in relevant part, *actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given* requires that a medical malpractice expert practice in the same area of practice or specialty as the defendant doctor. Again, Judge Roach was informed of the recent *Cotten v. Phillips* decision which rendered this issue moot. She was also informed of a second decision on this issue, *Abramson v. Williams*, 281 Ga. App. 617, S.E. 2d 765 (2007), which had been decided only the day before the hearing. The cases rendered the motions moot.

B. Proceedings Below

On December 26, 2006, Judge Roach granted the Respondents' Motions to Dismiss on issues NEVER raised by Respondents' in their Motions to Dismiss, or by either party at the hearing on the Motions to Dismiss on September 21, 2006.

Judge Roach ignored Dr. Schwartz's Affidavit testimony that he had knowledge and experience in diagnosing and surgically managing vascular rings, and held that Dr. Schwartz's area of expertise exists not in diagnosing vascular rings, but with their surgical remediation after diagnosis by another differently qualified professional. Judge Roach then dismissed the complaint finding that Dr. Schwartz's Affidavit failed to show that he had diagnosed a vascular ring on a specific date within five (5) years of March 12, 2002, the date of N.S.'s CT scan. (R-1348-1362). This sua sponte dismissal, on an issue never raised by respondents in their motion to dismiss, or argued at the hearing on the motion to dismiss, was an egregious violation of Petitioners' right to due process of law, and was completely and totally erroneous.

On December 10, 2007, Petitioners filed a Motion for Reconsideration. The Motion for Reconsideration was denied on December 14, 2007. Petitioners filed a Notice of Intent to Petition for a Writ of Certiorari with the Court of Appeals on December 21, 2007. The Georgia Supreme Court denied certiorari on May 19,

2008, with two of seven justices dissenting. Petitioners filed a Motion for Reconsideration in the Georgia Supreme Court on May 29, 2008. The Motion for Reconsideration was denied on June 30, 2008, with the same two justices dissenting.

C. When Constitutional Issue Raised

Petitioners preserved their due process argument in the Georgia Court of Appeals. Petitioners preserved their arguments regarding the exclusion of Dr. Schwartz's opinion as opposed to Dismissal of the case in the Georgia Court of Appeals. These issues were again raised in the Motions for Reconsideration and the Petition for Cert to the Georgia Supreme Court.

REASONS FOR GRANTING CERTIORARI

This case presents an exceptional violation of Petitioners' due process rights to full and fair notice and an opportunity to respond. The trial court dismissed Petitioners' case for failure to state a claim, on its own initiative, on an issue not before it, that had been forfeited by respondents when not raised with specificity in a motion to dismiss as required under Georgia law. The trial court has no discretion to dismiss a medical malpractice case for an insufficient affidavit on an issue waived by a defendant.

Furthermore, it can hardly be said that the Petitioners' medical malpractice complaint was so frivolous so as to warrant dismissal for failure to state a claim, especially on the trial court's own initiative, at the pleading stage. The Complaint was filed contemporaneously with the Affidavit of Dr. Schwartz, a board certified pediatric surgeon with over thirty (30) continuous years of experience in private practice as a pediatric surgeon and associate professor of pediatric surgery. Dr. Schwartz's testimony pertained to his expertise in pediatric surgery.

The Court of Appeals decision to affirm the trial court's sua sponte dismissal for failure to state a claim will inevitably lead to the unconstitutional application of 24-9-67.1(c) in the State of Georgia. The Court of Appeals' determination that notice was provided by the trial court because of the one line sentence indicating that a 24-9-67.1(d) hearing in a fifteen (15) page order which clearly had nothing to do with the *Daubert* 24-9-67.1(d) hearing would be conducted is notice of nothing. A hearing under 24-9-67.1(d) relates to *Daubert* hearings and a *Daubert* hearing was never conducted in this case. However, even *if a Daubert hearing was conducted in this case as contemplated by O.C.G.A. § 24-9-67.1(d), (which it clearly was not) and Dr. Schwartz's testimony was erroneously found to be inadmissible under a Daubert analysis, his opinion would merely be excluded at trial. This finding does not reach the merits of the case. The entire case would not be subject to dismissal*

based on the exclusion of Dr. Schwartz's testimony at trial.

Petitioners deserve a meaningful review of this case. Petitioners' due process rights were violated by the trial court's sua sponte dismissal of their complaint, and the Court of Appeals affirmance in the space of twenty-four (24) hours. This Court has granted certiorari to review decisions based on state law when the harm is particularly egregious. See *BMW of North America v. Gore,* 517 U.S. 559 (1996). This is such a case. N.S. has proven medical negligence against Respondents. Nevertheless, the trial court dismissed the case sua sponte for failure to state a claim. N.S. had no notice and was given no opportunity to respond. The Court of Appeals affirmed the decision in the space of twenty-four (24) hours and clearly did not conduct a meaningful review of the case. Finally, Dr. Schwartz's Affidavit clearly passed muster even under the erroneous procedure followed in this case.

I. The trial court's sua sponte dismissal of Petitioners' complaint deprived Petitioners of notice and an opportunity to respond.

In this case, the only issue raised by respondents in their motions to dismiss was that the Affidavit of Dr. Schwartz was defective because he was not a specialist in the same area of practice. This was the only issue that Petitioners were put on notice of. This

was the only issue raised by Respondents. This issue was decided adversely to respondents in *Cotten v. Phillips*, and *Abramson v. Williams*, 281 Ga. App. 617, 636, S.E. 2d 765 (2007) and Respondents' motions to dismiss were moot.

The trial court's sua sponte dismissal on the issue of when Dr. Schwartz diagnosed a vascular ring within three years of 2002 was never raised by defendants in their motions to dismiss, briefed by the parties, or orally argued at the hearing on defendants' motions to dismiss.

The Court of Appeals should have seized on this opportunity to correct such a blatant wrong that had been committed in the lower court. A review of the record revealed that the issue raised by respondents was rendered moot, the issue was moot when the trial court entered her pre-hearing order citing cases that were no longer good law, the trial court's sua sponte dismissal violated Petitioners' rights to due process of law under O.C.G.A. § 9-11-9.1, and the reasoning behind the dismissal itself was flawed because Dr. Schwartz's Affidavit testimony that he had experience diagnosing and surgically managing vascular rings was unrebutted. The trial court ignored the affidavit testimony, and found instead that his expertise existed in the surgical remediation of a vascular ring, not in the diagnosis of a vascular ring, and dismissed the case sua sponte, never giving Petitioners an opportunity to respond to this issue, which was never raised in this case.

Obviously, the additional four (4) Court of Appeals judges did not review the record because the decision was affirmed within the space of twenty-four (24) hours, which is clearly not enough time to make an informed decision on this voluminous record.

The Court of Appeals affirmed and held that the trial court's pre-hearing order gave Petitioners notice of the issue to be determined because of the one line sentence indicating that a 24-9-67.1(d) hearing would be conducted, to decide the moot overlap issues the trial court discussed in the fifteen (15) page pre-hearing order.

This one sentence discussion of notice is inaccurate and describes nothing. O.C.G.A. § 24-9-67.1(d) hearings pertain to *Daubert* investigations and must be requested on motion by a party, not the court. No party moved for a hearing pursuant to O.C.G.A. § 24-9-67.1(d). There was no motion by any party in this case for a *Daubert* investigation into the trial admissibility of Dr. Schwartz's opinions. No party briefed the *Daubert* issues in this case. No party orally argued any *Daubert* issues in this case at the hearing on respondents' motions to dismiss. Most obviously and most importantly, the trial judge did not make a *Daubert* decision or determination or analysis or review or consideration in any way shape or form in her order in this case.

The only hearing that was conducted was on respondents' motion to dismiss on the issue of whether an expert testifying by affidavit in a medical

malpractice case was required to be a specialist in the same field as the defendant doctors which was already moot by the time of that hearing.

II. The Court of Appeals found that the trial court did not err in its conclusion that Dr. Schwartz was not competent to give an affidavit in this case. Specifically, the Court of Appeals found that the record was silent as to when within the last thirty years Dr. Schwartz had diagnosed the condition at issue. However, Dr. Schwartz's Affidavit testimony is more than sufficient to qualify him under any standard, even under the tortured reasoning of the trial court and the Court of Appeals

Dr. Schwartz testified that he is involved every day in determining whether a child needs surgery. Dr. Schwartz testified that he has been diagnosing and surgically managing vascular rings for over 30 years, which is sufficient to satisfy O.C.G.A. § 24-9-67.1 pursuant to every single Court of Appeals decision that has interpreted an expert's qualifications under the statute. See *Mays v. Ellis*, 283 Ga. App. 195, 647 S.E. 2d 201 (2007), *MCG Health v. Barton*, 285 Ga. App. 577, 647 S.E. 2d 201 (2007), *Cotten v. Phillips*. 280 Ga. App. 280, 633 S.E. 2d 655 (2006), *Abramson v. Williams*, 281 Ga. App. 617, 636, S.E. 2d 765 (2007).

In *Abramson v. Williams,* Plaintiff's medical malpractice Complaint was based on the negligent

failure to diagnose a broken hip. Plaintiff's expert, Dr. Tatum testified "I am in active practice of orthopedic medicine and have been continuously so for more than 30 years." This was deemed sufficient. Dr. Tatum was not required to provide specific dates or details regarding when he diagnosed a broken hip in order to be deemed competent to testify regarding the failure to diagnose a broken hip. *Supra.*

In *MCG Health v. Barton, supra*, Barton filed a malpractice action alleging that his treating physicians negligently delayed treatment which resulted in the loss of a testicle. Attached to his Complaint, was the Affidavit of Dr. Britenburg, an emergency room physician with over 20 years of emergency room experience. Defendant filed a motion to exclude and for summary judgment arguing that Dr. Britenburg was not qualified to testify based on his affidavit and deposition testimony. In his affidavit, Dr. Britenburg testified that "deponent is a licensed and practicing physician in the State of South Carolina and has for twenty four years practiced medicine as a staff physician at the Anderson Area Medical Center, Emergency Dept." During Dr. Britenburg's deposition, he was asked the last time he treated a testicular injury. He testified "I couldn't tell you. . . . In my career I've maybe treated a couple dozen testicular torsions . . . maybe a dozen or two (2)." The Court of Appeals held that the testimony of Dr. Britenburg, a licensed physician with over 20 years of emergency room experience was qualified to testify on behalf of the

plaintiff regarding the delayed diagnosis of a testicular injury.

Certainly if Dr. Tatum was qualified to give an affidavit in a medical malpractice case involving the failure to diagnose a broken hip without setting forth the dates that he diagnosed a broken hip, and if Dr. Britenburg was qualified to give an opinion in a medical negligence case involving a delayed diagnosis, without offering specific dates as to when he diagnosed a testicular torsion, Dr. Schwartz's Affidavit testimony, that he determines whether surgery is the best option for a child every day and has diagnosed and surgically managed vascular rings for the last 30 years is more than sufficient to qualify him as an expert under any standard. No discretion is broad enough to countenance such contrary findings in the Court of Appeals decisions.

It is nonsensical, wrong, unjust and incorrect for the Court of Appeals to approve the testimony of Dr. Tatum and Dr. Britenburg and then say that Dr. Schwartz's testimony does not pass muster. For the Court of Appeals to approve the testimony of Dr. Tatum as having sufficient knowledge regarding the failure to diagnose a broken hip when Dr. Tatum's Affidavit was completely silent as to when he made a diagnosis of a broken hip; and approve the testimony of Dr. Britenburg as having sufficient knowledge regarding testicular torsion cases when Dr. Britenburg's testimony was that he has seen 12-24 such cases in his 26 year history (which means on the low end less than ½ case per year); and then reject the

affidavit testimony of Dr. Schwartz regarding the missed diagnosis of a vascular ring when he has averred in his affidavit that he has dealt with the diagnosis, surgical management, and care of vascular ring pediatric patients *daily* for the past 32 consecutive years is wholly inconsistent and absolutely wrong.

III. If a *Daubert* hearing was conducted, the Court of Appeals erred in concluding that an expert's testimony which is found to be inadmissible at trial under *Daubert* results in dismissal of the case when there is unrebutted expert testimony on the record.

Even if a Daubert hearing was conducted in this case as contemplated by O.C.G.A. § 24-9-67.1(d), and Dr. Schwartz's testimony was erroneously found to be inadmissible under a Daubert analysis, his opinion would merely be excluded at trial. This finding does not reach the merits of the case. The entire case would not be subject to dismissal based on the exclusion of Dr. Schwartz's testimony at trial.

This is a case where N.S.'s own treating physician has given deposition testimony on his behalf. Dr. Kanter, a board certified pediatric cardiothoracic surgeon, and chief of pediatric cardiothoracic surgery at Children's Hospital and tenured professor at Emory University School of Medicine, has established medical negligence against the Respondent doctors.

Therefore, even based on the Court of Appeals erroneous reasoning, dismissal of this action was improper. If the trial court conducted a *Daubert* hearing as determined by the Court of Appeals, and Dr. Schwartz's testimony was found to be insufficient based on *Daubert*, his testimony would merely be excluded at trial. The Complaint would not be dismissed. The trial court has discretion to admit or exclude testimony at trial based on *Daubert*. The trial court does not have discretion to dismiss a complaint based on its discretionary decision to exclude testimony at trial, when there is testimony of negligence in the record. Thus, assuming arguendo, there was indeed a *Daubert* hearing, this case was not subject to dismissal – only to the possible exclusion of Dr. Schwartz's testimony. (Appellees have filed *no* Motion for Summary Judgment or to Dismiss alleging that Dr. Kanter's testimony is insufficient to get to a jury).

Here, however, the Court of Appeals has done just that. The Court of Appeals has affirmed the trial court's dismissal of Petitioners' Complaint, based on its finding that the trial court made a discretionary *Daubert* ruling (though the record is clear that no such hearing was requested by Respondents, briefed by Respondents, argued by Respondents or analyzed by the trial court) to exclude Dr. Schwartz's testimony at trial. This case is not subject to dismissal even if Dr. Schwartz's testimony is excluded at trial. Dr. Kanter has testified on behalf of Petitioners and has established medical negligence and causation on behalf of the Respondent doctors. His testimony is

currently unrebutted and there has never been a Motion to Dismiss or Motion for Summary Judgment to dismiss the case based on any deficiency in Dr. Kanter's testimony.

If full Court review is not deemed necessary here, this Court at least has the authority to grant, vacate, and remand this case back to the trial court, to at least conduct the 24-9-67.1(d) *Daubert* hearing that never took place in this case, but is somehow the Georgia Court of Appeals basis for affirmance. See, for example, *Thomas v. American Home Products*, 519 U.S. 913 (1996).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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655 S.E.2d 656

Court of Appeals of Georgia.
SPACHT et al.
v.
TROYER et al.
No. A07A1531.

Nov. 30, 2007.
Reconsideration Denied Dec. 14, 2007.
Certiorari Denied May 19, 2008.

Greer, Klosik, Daugherty, Swank & McCune, Robert J. McCune, Alina A. Krivitsky, John F. Daugherty, Atlanta, for appellants.

Owen, Gleaton, Egan, Jones & Sweeney, H. Andrew Owen, Jr., Greenberg Traurig, Darcy F. Coty, Lori G. Cohen, Michael J. King, Weinberg, Wheeler, Hudgins, Gunn & Dial, Robert G. Tanner, Thomas E. Lavender III, Atlanta, for appellees.

MIKELL, Judge.

Timothy and Andrea Spacht, individually and on behalf of N.S., a minor, sued Children's Healthcare of Atlanta, Dr. Wendy A. Troyer, Dr. William G. Keyes, Dr. James Thomsen, Dr. Verlia Gower, Dr. Theodore Brand, and Dr. John Bleacher for medical malpractice. The Spachts supported their complaint with an affidavit from Dr. David L. Schwartz, a pediatric surgeon, who opined that the defendant doctors had deviated from the acceptable standard of care. Drs. Troyer and Keyes, both neonatologists, filed a motion to dismiss, claiming that the affidavit was insufficient under OCGA § 9-11-9.1 because Dr. Schwartz was not

qualified under OCGA § 24-9-67.1(c). Drs. Thomsen and Gower, both pediatric otolaryngologists, filed a similar motion to dismiss.

The trial court concluded that it had insufficient information to determine whether Dr. Schwartz was competent to testify against the defendant doctors and ordered an OCGA § 24-9-67.1(d) pretrial hearing. After conducting the hearing and considering "all of the evidentiary materials of record," including a supplemental affidavit from Dr. Schwartz and affidavits and depositions from the defendant doctors, the court granted the motions to dismiss. The Spachts then obtained a certificate of immediate review. We granted appellants' application for interlocutory appeal. For the reasons outlined below, we affirm the trial court's ruling.

1. Initially, the parties dispute the appropriate standard of review. OCGA § 9-11-9.1(e) requires an affiant to meet the requirements of OCGA § 24-9-67.1. The penalty for failure to supply a proper affidavit per OCGA § 9-11-9.1 is dismissal. Usually dismissals are subject to de novo review.[1] But the interplay of the two Code sections means that, when the trial court has had the hearing contemplated by OCGA § 24-9-67.1(d) as in this case, our review

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[1] *Atlanta Women's Health Group v. Clemons*, 287 Ga.App. 426, 651 S.E.2d 762 (2007).

determines only whether the trial court has abused its discretion.[2]

2. The Spachts claim that the trial court erred by dismissing their complaint on issues not raised or addressed by the parties – whether Dr. Schwartz qualified as a "practicing expert" or "teaching expert" as defined in OCGA § 24-9-67.1(c)(2). They point out that, in their motions to dismiss, the defendant doctors argued that Dr. Schwartz was not qualified to render an opinion because he lacked experience in neonatology or pediatric otolaryngology.

An expert testifying about the standard of care in a medical malpractice case need not actively practice in the same specialty or practice area as the defendant doctor.[3] Thus, the fact that Dr. Schwartz is a pediatric surgeon and not a neonatologist or pediatric otolaryngologist would not have authorized the court to dismiss the Spachts' complaint. Nonetheless, Dr. Schwartz must meet the requirements of OCGA § 24-9-67.1 to be deemed qualified to testify under OCGA § 9-11-9.1,[4] and the trial court adequately notified the

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[2] *MCG Health v. Barton*, 285 Ga.App. 577, 580(1), 647 S.E.2d 81 (2007); *Mays v. Ellis*, 283 Ga.App. 195, 199(1)(b), 641 S.E.2d 201 (2007).

[3] *Mays, supra* at 196-197(1)(a), 641 S.E.2d 201; *Canas v. Al-Jabi*, 282 Ga.App. 764, 795(3)(c), 639 S.E.2d 494 (2006), rev'd on other grounds, *Kaminer v. Canas*, 282 Ga. 830, 653 S.E.2d 691 (2007); *Cotten v. Phillips*, 280 Ga.App. 280, 282-285, 633 S.E.2d 655 (2006).

[4] OCGA § 24-9-67.1(e).

parties that it would be considering those issues at the OCGA § 24-9-67.1(d) hearing.

3. We turn now to the pivotal question on appeal, whether the trial court erred in its conclusion that Dr. Schwartz was not competent to testify as an expert under OCGA § 24-9-67.1 based on its review of Dr. Schwartz's affidavits. We find that it did not abuse its discretion in so concluding.

In pertinent part, Dr. Schwartz averred in his supplemental affidavit that

> [a]s a board certified pediatric surgeon, I have the training, knowledge and experience to diagnose and surgically manage children with vascular rings, which is the medical condition at issue in this case. My knowledge and experience in diagnosing and surgically managing children with vascular rings was gained from my extensive medical training and experience. . . . Every day I cooperate with all of the specialists involved in a child's medical care to determine whether surgery is the best option for a child. I regularly cooperate with neonatologists and pediatric otolaryngologists to manage surgical problems in children. A child with a vascular ring must be diagnosed immediately by neonatologists and/or pediatric otolaryngologists and then they must refer the child to a pediatric surgeon so that the pediatric surgeon may immediately evaluate the child for surgical division of the vascular ring. Based upon over thirty years of experience in diagnosing

> and surgically managing children with vascular rings and upon a review of the certified medical records from Children's Healthcare of Atlanta which reflects the treatment that Dr. Troyer, Dr. Keyes, Dr. Gower, and Dr. Thomsen gave to [N.S.], it is my opinion that Dr. Troyer, Dr. Keyes, Dr. Gower[,] and Dr. Thomsen failed to exercise that degree of skill and care ordinarily required by the medical profession in general under like conditions and similar circumstances.

Dr. Schwartz then lists specific acts or omissions committed by the defendant doctors.

Pursuant to OCGA § 24-9-67.1(c)(2), the opinion of an expert in a medical malpractice action is admissible only if, at the time of the act or omission alleged to have occurred, the expert

> had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in: (A) The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, *as determined by the judge,* in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; or (B) The teaching of his or her profession for at least three of the last five years

> as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient frequency to establish an appropriate level of knowledge, *as determined by the judge,* in teaching others how to perform the procedure, diagnose the condition, or render the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue.[5]

Subsection (f) of the statute provides that

> [i]t is the intent of the legislature that, in all civil cases, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states. Therefore, in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 [113 S.Ct. 2786, 125 L.Ed.2d 469] (1993); *General Electric Co. v. Joiner,* 522 U.S. 136 [118 S.Ct. 512, 139 L.Ed.2d 508] (1997); *Kumho Tire Co. Ltd. v. Carmichael,* 526 U.S. 137 [119 S.Ct. 1167, 143 L.Ed.2d 238] (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.[6]

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[5] (Emphasis supplied.)

[6] OCGA § 24-9-67.1(f).

Constant in *Daubert* and cases applying the standards set forth therein is the theme that the trial court is the gatekeeper of expert testimony.[7] OCGA § 24-9-67.1 is consistent with this theme because it gives the trial judge the discretion to determine whether the purported expert is competent to testify. In the case at bar, the trial court considered affidavits, had a hearing, and considered late-filed affidavits on the issue before rendering its decision. This careful, fact-based procedure is precisely what the statute, OCGA § 24-9-67.1, contemplates.[8]

(a) Applying the statute, the trial court concluded that Dr. Schwartz was not competent to testify as a practicing expert because, despite his averment that he regularly cooperated with neonatologists and pediatric otolaryngologists in managing pediatric surgical problems and had over 30 years of experience in diagnosing and surgically managing children with vascular rings, the record was silent as to "*when* within the last

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[7] *See generally Nathans v. Diamond*, 282 Ga. 804, 806, n. 8, 654 S.E.2d 121 (2007) ("OCGA § 24-9-67.1(c)(2)(A) grants trial courts the authority to determine whether an expert is properly qualified"); *McDowell v. Brown*, 392 F.3d 1283, 1298(IV) (11th Cir.2004) ("In *Daubert*[, *supra*], the United States Supreme Court impressed a gatekeeping role upon judges, and directed them to ensure that any and all scientific testimony or evidence is not only relevant, but reliable") (punctuation omitted); *Daubert, supra* at 589, 113 S.Ct. 2786; *Pipitone v. Biomatrix*, 288 F.3d 239, 250(II)(C) (5th Cir.2002); *Dodge v. Cotter Corp.*, 203 F.3d 1190, 1200(IV), n. 12 (10th Cir.2000).

[8] *See Cotten, supra* at 286, 633 S.E.2d 655.

thirty years Dr. Schwartz ha[d] 'diagnosed the condition' which the doctor defendants in this case are alleged to have wrongfully failed to diagnose – specifically, the 'vascular ring.'" Accordingly, the trial court was "unable to determine from the record before it whether Dr. Schwartz had made even *one* diagnosis of a 'vascular ring' within five years of March 12, 2002," the date at issue in this case.

As stated earlier, subsection (c)(2)(A) of the statute requires practice "of such area of specialty . . . for at least three of the last five years, with sufficient frequency to establish *an appropriate level of knowledge, as determined by the judge.*"[9] In a recent decision, the Supreme Court of Georgia made clear that this language does not require an expert to have knowledge and experience in the same area of practice or specialty as the defendant doctors.[10] Instead, the expert must have "knowledge and experience in the practice or specialty that is relevant to the acts or omissions that the plaintiff alleges constitute malpractice."[11]

To determine "the area of practice or specialty in which the opinion is to be given," we look to the allegations of plaintiff's complaint and not to the

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[9] (Emphasis supplied.) OCGA § 24-9-67.1. *See Cotten, supra* at 284, n. 8, 633 S.E.2d 655.

[10] *Nathans, supra* (approving *Barton, supra*; *Mays, supra*; and *Cotten, supra*).

[11] *Id.*

treating physician's apparent expertise.[12] Here, the complaint alleges that the defendant doctors failed to read and act upon CAT scan results, which revealed that N.S., who was two and one-half months old at the time, had a vascular ring. The complaint further alleges that the doctors should have referred N. for surgery to divide the vascular ring, but instead performed an unnecessary tracheotomy, salivary gland excision, and other procedures that could have been avoided if the defendant doctors had recognized and treated the vascular ring. It does not allege that the defendant doctors performed the allegedly unnecessary procedures negligently. Thus, the "area of practice or specialty in which the opinion is to be given" involves the diagnosis of a vascular ring.[13]

In this case, the trial court specifically found that the "three of the last five years" portion of the requirements set forth in the statute was fulfilled by the statement in Dr. Schwartz's affidavit that he had "over thirty years of experience in diagnosing and surgically managing children with vascular rings." The trial court's ruling that Dr. Schwartz was not competent to testify as a practicing expert, however, was based upon its finding that he did not state in his affidavits the frequency with which he diagnosed the

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[12] *Barton, supra* at 581(1), 647 S.E.2d 81; *Mays, supra* at 198(1)(b), 641 S.E.2d 201; *Abramson v. Williams*, 281 Ga.App. 617, 619, 636 S.E.2d 765 (2006).

[13] *See Mays, supra*.

condition. Although the three-year and five-year time lines, established by the legislature, are precise limitations on the trial court's discretion, we cannot say that the trial courts abused its discretion when it found that the "three of the last five years" requirement was satisfied by Dr. Schwartz's affidavit.[14]

Additionally, we cannot hold as a matter of law that a trial court abuses its discretion when, after an OCGA § 24-9-67.1(d) hearing, it decides that a physician who specializes in one area of medicine lacks the "appropriate level of knowledge" to testify against a physician in a different specialty, albeit a closely related one, based upon a factual finding that the affidavit does not expressly state the frequency with which the affiant has diagnosed the condition that is alleged to have been misdiagnosed.[15] Although the affiant here asserts that he frequently "cooperates with" physicians in the sued specialties, is very familiar with vascular rings, and frequently has operated to correct vascular rings over his 30 years of experience, he does not state when during his 30 years of practice he diagnosed the condition. Based on the record here, we cannot conclude that the trial

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[14] *Canas, supra* at 796(3)(c), 639 S.E.2d 494.

[15] OCGA § 24-9-67.1(c)(2)(A) allows an "appropriate level of knowledge" to be demonstrated in performing a procedure, diagnosis, *or* treatment. Here, however, as the trial court recognized in its order, the plaintiffs limited the analysis in this case to diagnosis alone, both by the allegations in the complaint and by the expert's own affidavit testimony.

court's findings that it was unable to determine from the record that Dr. Schwartz had made even one diagnosis of a "vascular ring" within five years of March 12, 2002, and consequently, that Dr. Schwartz was not competent to offer an opinion as a practicing expert, constituted an abuse of its discretion. The statute specifically assigns to the trial court the duty to determine whether the expert actively practiced the area of specialty with sufficient frequency to establish an appropriate level of knowledge to render him competent to testify. The trial court did not abuse its discretion in finding here that Dr. Schwartz was not competent to testify as a "practicing expert."

(b) The trial court also found that Dr. Schwartz was not competent to testify as a "teaching expert." As the trial court's order stated, although the affidavit indicated that he was a member of the faculty at two schools, there was no evidence that he

> is or was an "employed" member of either faculty, that he was actually *teaching* at either institution as an employed faculty member, that he had so taught "for at least three of the last five years" relative to the date the alleged failure to diagnose took place, or most importantly, that [while there he] has taught others to "diagnose the condition . . . which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue," *and* "with sufficient frequency to establish an appropriate level of knowledge" to the Court.

(Emphasis in original.) OCGA § 24-9-67.1(c)(2)(B) provides that an expert may establish his professional knowledge and expertise based on

> [t]he teaching of his or her profession for at least three of the last five years as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient frequency to establish an appropriate level of knowledge, *as determined by the judge,* in teaching others how to perform the procedure, diagnose the condition, or render the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue.[16]

The trial court correctly interpreted the statute, concluding that in order to be deemed competent through this subsection of the statute, the witness, to be qualified, must have been an *employed* member of the faculty of an educational institution and must have taught others, for at least three of the last five years, to diagnose the condition that is alleged to have been performed or rendered negligently by the defendant doctors. In this case, neither the affidavit nor the supplemental affidavit so states. Instead, the supplemental affidavit states that Dr. Schwartz was an "assistant clinical professor" in surgery at one institution since 1974 and a "clinical assistant professor" at another since 1978. There is no mention

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[16] (Emphasis supplied.) OCGA § 24-9-67.1(c)(2)(B).

whatsoever as to whether Dr. Schwartz was *employed* by an educational institution in 2002 and in the five years prior to that and no mention of his having taught the subject necessary to be deemed an expert within five years of March 12, 2002. Therefore, we cannot find that the trial court abused its discretion when it concluded that Dr. Schwartz could not qualify as a "teaching expert" in this case. Accordingly, we affirm the trial court's grant of the defendant doctors' motions to dismiss.

Judgment affirmed.

ANDREWS, P.J., BLACKBURN, P.J., SMITH, P.J., and RUFFIN, J., concur.

JOHNSON, P.J., and PHIPPS, J., concur in part and dissent in part. PHIPPS, Judge, concurring in part and dissenting in part.

I concur in Divisions 1 and 2. Because Dr. Schwartz was qualified under OCGA § 24-9-67.1(c)(2)(A) to render an expert opinion about the diagnosis and treatment of a vascular ring, the trial court abused its discretion by granting the defendant doctors' motions to dismiss. I therefore dissent to Division 3(a). I concur specially in Division 3(b).

We have repeatedly stated and the Supreme Court of Georgia has made clear that the language of OCGA § 24-9-67.1(c)(2)(A) does not require an expert to have knowledge and experience in or to actively

practice in the same area of practice or specialty as the defendant doctors.[17] Yet the majority plainly applies a more stringent standard here because Dr. Schwartz is not a neonatologist or pediatric otolaryngologist. The appropriate inquiry is whether the expert has "knowledge and experience in the practice or specialty that is relevant to the acts or omissions that the plaintiff alleges constitute malpractice."[18]

Based on the complaint's allegations, the "area of practice or specialty in which the opinion is to be given" involves the diagnosis and treatment of a vascular ring.[19] Dr. Schwartz testified that he is a board certified pediatric surgeon and has the "training, knowledge, and experience to diagnose and surgically manage children with vascular rings." He further testified that he daily cooperates with all specialists involved in a child's care to determine whether surgery is the best option and regularly cooperates with neonatologists and pediatric otolaryngologists to manage surgical problems in children. Dr. Schwartz averred that he has "over thirty

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[17] *Nathans v. Diamond*, 282 Ga. 804, 654 S.E.2d 121 (2007); *Mays v. Ellis*, 283 Ga.App. 195, 196-197(1)(a), 641 S.E.2d 201 (2007); *Canas v. Al-Jabi*, 282 Ga.App. 764, 795(3)(c), 639 S.E.2d 494 (2006), rev'd on other grounds, *Kaminer v. Canas*, 282 Ga. 830, 653 S.E.2d 691 (2007); *Cotten v. Phillips*, 280 Ga.App. 280, 284-285, 633 S.E.2d 655 (2006).

[18] *Nathans, supra*.

[19] *See Mays, supra* at 198(1)(b), 641 S.E.2d 201.

years experience in diagnosing and managing children with vascular rings."

We have allowed doctors with less experience to render expert opinions in medical malpractice cases. For example, earlier this term, we decided *MCG Health v. Barton,*[20] in which an emergency room physician testified that a urologist breached the standard of care by failing to timely evaluate and treat an injury, resulting in the loss of a testicle.[21] The plaintiff's expert testified that he was "a licensed physician with over 20 years of emergency room experience, including experience diagnosing testicular injuries," and that was deemed sufficient to qualify him to testify regarding the failure to timely evaluate the plaintiff's injuries.[22] Despite the fact that Dr. Schwartz has been practicing pediatric surgery since 1974 and has over 30 years experience in diagnosing vascular rings, the majority does not find his experience sufficient to allow him to testify regarding the failure to diagnose N.S.'s vascular ring.

The trial court determined that Dr. Schwartz did not qualify as a "practicing expert" witness under OCGA § 24-9-67.1(c)(2)(A) because his affidavits failed to show that he had diagnosed a vascular ring on a specific date within five years of the alleged failure to diagnose. Dr. Schwartz testified, however,

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[20] 285 Ga.App. 577, 647 S.E.2d 81 (2007).

[21] *Id.* at 580, 647 S.E.2d 81.

[22] *Id.* at 581(1), 647 S.E.2d 81.

that he is involved every day in determining whether a child needs surgery. A vascular ring is an uncommon genetic disorder that requires surgery, and Dr. Schwartz testified that he has the knowledge and experience to diagnose this condition. He specifically testified that he has been diagnosing and managing vascular rings for at least the last 30 years, which is sufficient to satisfy the statute. The majority interprets the statute far too narrowly by concluding otherwise.

Because the record shows that "the area of practice or specialty in which the opinion is to be given" is an area of practice in which Dr. Schwartz "possessed the requisite knowledge and experience under OCGA § 24-9-67.1(c)(2),"[23] he is authorized to render an expert opinion in the case about the diagnosis and treatment of a vascular ring.[24]

I am authorized to state that Presiding Judge JOHNSON joins in this opinion.

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[23] *Barton, supra* at 581-582, 647 S.E.2d 81; *see also Mays, supra* at 199, 641 S.E.2d 201.

[24] *See Abramson v. Williams,* 281 Ga.App. 617, 619, 636 S.E.2d 765 (2006).

IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

TIMOTHY AND ANDREA SPACHT, individually and as next friend of N.S., a minor child,	:	Civil Action File No. 06CV-4104-4
Plaintiffs,	:	
vs.	:	
CHILDREN'S HEALTHCARE OF ATLANTA, INC., DR. WENDY A. TROYER, DR. WILLIAM G. KEYES, DR. JAMES THOMSEN, DR. VERLIA GOWER, DR. THEODORE BRAND, and DR. JOHN BLEACHER,	:	
Defendants.	:	

ORDER ON DEFENDANTS' MOTIONS TO DISMISS AND PLAINTIFFS' MOTION FOR PROTECTIVE ORDER

(Filed July 28, 2006)

Defendants WENDY A. TROYER's and WILLIAM G. KEYES' motion to dismiss (filed April 18, 2006), Defendant CHILDREN'S HEALTHCARE OF ATLANTA's O.C.G.A. § 9-11-9.1 motion to dismiss (filed April 19, 2006), Defendant CHILDREN'S HEALTHCARE OF ATLANTA's O.C.G.A. § 9-11-9.2 motion to dismiss (filed April 19, 2006 and supplemented May 4 and June 29, 2006), Defendants JAMES THOMSON's

and VERLIA GOWER's motion to dismiss (filed May 15, 2006), and Plaintiffs' motion for protective order (filed May 26, 2006) came regularly before the Court for consideration. Upon review of the pleadings and other matters of record,[1] the Court finds as follows:

This is an action for medical malpractice. Plaintiffs contend herein that Defendants failed to diagnose and treat a "vascular ring" in their minor child, N.S., such that for the first two and one-half years of his life the child underwent numerous unnecessary and painful surgeries and medical and therapeutic treatments to remediate problems attributable to and remediable by treatment of the "root cause" of the problem, e.g., the undiagnosed vascular ring. As a result of this misdiagnosis and treatment, Plaintiffs contend, they have incurred unnecessary medical expenses and emotional pain and suffering, and their child has and will continue to experience physical and emotional pain and suffering throughout his life.

Defendant[2] now move for the dismissal of Plaintiffs' complaint against them, contending that

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[1] Oral argument was requested on only one motion to dismiss, that of Defendants KEYES and TROYER. As the substance of all defendants' motions to dismiss is the same, the Court declines to hear oral argument on one only and addresses all pending motions to dismiss in this Order. Uniform Superior Court Rule 6.3 (West 2005).

[2] Defendants THEODORE BRAND and JOHN BLEACHER filed separate answers on May 11, 2006, but have not moved to dismiss Plaintiffs' complaint. For the purposes of this order, the Court refers to the moving defendants collectively as "Defendants."

Plaintiffs' O.C.G.A. § 9-11-9.1 expert affidavit is legally insufficient, and further that Plaintiffs failed to comply with the initial pleading requirements of the newly-enacted O.C.G.A. § 9-11-9.2, requiring a release of medical records to be filed contemporaneously with the complaint for medical malpractice. The Court addresses these claims below in reverse order.

O.C.G.A. § 9-11-9.2 Medical Records Release Authorization Requirement[3]

There exists no dispute in this case that Plaintiffs did not file the medical records release authorization required by O.C.G.A. § 9-11-9.2 "contemporaneously with the filing of their complaint," or that the "conditional" release which they subsequently filed on May 2, 2006 does not comply with that statute's requirements. O.C.G.A. § 9-11-9.2(b)

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[3] In any action for damages alleging medical malpractice against a professional licensed by the State of Georgia and listed in subsection (d) of Code Section 9-11-9.1 against a professional corporation or other legal entity that provides health care services through a professional licensed by the State of Georgia and listed in subsection (d) of Coda Section 9-11-9.1, or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of **Georgia** and listed in subsection (d) of Coda Section 9-11-9.1 *contemporaneously with the filing of the complaint, the plaintiff shall be required to file a medical authorization form. Failure to provide this authorization shall subject the complaint to dismissal.*

O.C.G.A. § 9-11-9.2(a) (Supp. 2005) (emphasis added).

(Supp. 2005).[4] Such failure subjects Plaintiff's complaint to dismissal upon motion by defendants. *Id.* On July 13, 2006, however, the Georgia Court of Appeals affirmed the decision of DeKalb State Court Judge Edward Carriere that the medical records release authorization requirement of O.C.G.A. § 9-11-9.2 conflicts with, and is preempted by, federal law.

> Linda Queen brought a medical malpractice action against Northlake Medical Center, LLC and others. Northlake moved to dismiss the complaint for Queen's failure to comply with the medical record release requirement of OCGA § 9-11-9.2. The trial court denied the motion, concluding that Section 9-11-9.2 was preempted by the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191 ("HIPPA"), and thus Queen was not required to file a medical records release authorization in compliance with the Georgia statute. We granted Northlake's application for interlocutory appeal, as the issue of whether HIPPA preempts OCGA 9-11-9.2 is one of first impression.
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> . . .
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> The authorization which Queen filed with her complaint . . . *does not* state that Queen is agreeing to the statutory requirements. In fact, the authorization adopts the opposite

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[4] Plaintiffs on June 8, 2008 also filed in the record a complete and certified copy of the medical records of N.S. from Children's Healthcare of Atlanta at Scottish Rite Hospital.

position, that the recipient health care provider may provide medical records *only* to Queen's attorneys, not to Northlake's attorneys. The authorization states, that Queen "maintains that [HIPPA] preempts State law, including the provisions of OCGA § 9-11-9.2 . . . "[5] . . . Thus, the authorization does not satisfy OCGA § 9-11-9.2, and Queen's complaint would be subject to dismissal unless the Georgia statute is preempted.

. . .

Northlake argues that HIPPA does not preempt Section 9-11-9.2 because the state law does not contravene HIPPA and it is possible to comply with both HIPPA and OCGA 9-11-9.2. Queen, on the other hand, contends that the statute is preempted because it does not *require* that the elements necessary for a valid authorization under HIPPA be present in an authorization under OCGA § 9-11-9.2.

. . . [W]e conclude that the authorization set forth in OCGA § 9-11-9.2 is contrary to HIPPA because it does not satisfy the requirements of a valid HIPPA authorization. . . . Northlake urges us to read OCGA

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[5] Plaintiffs in their May 2, 2008 "Conditional Medical Authorization Form," similarly attempt by non-statutory language inserted therein to preserve Plaintiffs' privacy rights under HIPPA and any other relevant state or federal law, and makes such release "conditional" upon a ruling by the Court (or an appellate court) that Section 9-11-9.2 applies to this matter. (Plaintiffs' First Amended Complaint, filed May 2, 2006.)

> § 9-11-9.2 to require a HIPPA-compliant authorization because, as a newer statute, it should be read in conjunction with existing law. This would, however, require us to not merely interpret the Code section in light of HIPPA, but to affirmatively add several provisions found nowhere in the statute. It is not the Court's function to rewrite statutes. Because we conclude that OCGA § 9-11-9.2 is contrary to HIPPA and none of the exceptions contained in 45 C.F.R. § 160.203 applies, it is preempted by HIPPA.

Northlake Medical Center LLC v. Queen, No. A06A0540, slip op. at 3 (Ga.Ct.App. July 13, 2006) (underline emphasis added) (footnotes omitted).

Accordingly, Defendant CHILDRBN'S O.C.G.A. § 9-11-9.2 motion to dismiss shall be denied, and those portions of the defendant doctors' motions to dismiss which are premised upon Plaintiffs' failure to comply with O.C.G.A. § 9-11-9.2 shall likewise be denied. Plaintiffs' motion for a protective order, interposed in response to Defendants' Section 9-11-9.2 motions to dismiss, is rendered moot by this holding and will be denied as such.

O.C.G.A. § 9-11-9.1 – Expert Affidavit Requirement[6]

Although Defendants assert substantially the same arguments in moving to dismiss Plaintiffs' complaint pursuant to O.C.G.A. § 9-11-9.2, the contentions raised in their Section 9-11-9.1 motions to dismiss diverge along identity lines. The defendant hospital (CHILDREN'S) contends that Plaintiffs' expert affidavit is insufficient as it fails to specifically allege a negligent act or omission by such hospital, while the defendant doctors (TROYER, KEYES, THOMSEN, and GOWER) contend that the affidavit is deficient as Plaintiffs' expert is not competent to testify in the various specialties and subspecialties

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[6] In any action for damages alleging professional malpractice against a professional licensed by the State of Georgia and listed in subsection (d) of this Code section or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of Georgia and listed in subsection (d) of this Code section, the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim.

If a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed on or before the close of discovery, that said affidavit is defective, the plaintiff's complaint is subject to dismissal for failure to state a claim. . . .

O.C.G.A. § 9-11-9.1(a), (b) (1993).

practiced by such defendant doctors. The Court addresses their contentions separately below.

Defendant Hospital

Defendant CHILDREN'S contends that Plaintiffs' complaint against them must be dismissed pursuant to O.C.G.A. § 9-11-9.1 as "[n]owhere in his affidavit does Dr. Schwartz ever allege that any nurse, technician, or other agent or employee of Defendant CHILDREN'S deviated from the applicable standard of care in any respect in the treatment of [N.S.]" (Defendant CHILDREN'S brief, p. 2.) The affidavit signed by Plaintiffs' expert, Defendant CHILDREN'S contends,

> is factually identical to . . . the affidavits presented in *Cander Hospital v. Carter, 224 Ga.App. 425 (1997)* and *Goins v. Tucker, 227 Ga. App. 524 (1997)*.[7] In both of these medical malpractice cases involving a hospital defendant and physician co-defendants, the plaintiffs' experts signed affidavits specifying acts of negligence against co-defendant physicians, without specifying any acts of negligence against the hospital or their agents or employees. Both cases were dismissed

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[7] In order that the Court may quickly locate and review the parties' authority, counsel are requested to comply with standard citation form for Georgia cases, which requires a citation to the Georgia or Georgia Appeals Reporter (as appropriate) *and* the Southeastern Reporter as well.

> against the hospitals on the basis that plaintiffs' experts' affidavits were insufficient . . . pursuant to O.C.G.A. § 9-11-9.1.

(Defendant CHILDREN'S brief, pp. 2-3.)

In response, Plaintiffs argue that "the liability of . . . CHILDREN'S . . . is based upon [the doctrine of] *respondeat superior*," pointing to Paragraph 10 of their Complaint wherein they allege that Defendant CHILDREN'S "held out" the doctor defendants "as being employees, giving its patients a reasonable belief that said Defendants were acting as agents or employees [of Defendant CHILDREN'S] at all times herein. . . . " (Plaintiff's response, p. 2.) Because the expert affidavit sufficiently identifies negligent acts or omissions by the defendant doctors, their alleged negligence is attributable to Defendant CHILDREN'S under the doctrine of *respondeat superior,* and the affidavit is legally sufficient, Plaintiffs contend, citing *Tenet Healthcare Corp. v. Gilbert*, 277 Ga.App. 895, 627 S.E.2d 821 (2006). (Plaintiffs response, p. 2.)

The Court concurs with Plaintiffs.

In *Dozier v. Clayton Co. Hosp. Authority,* 206 Ga.App.62, 424 S.E.2d 632 (1992), the Court of Appeals considered whether an affidavit which failed to assert any act of negligence directly against the defendant hospital authority failed to meet the initial pleading requirements of Section 9-11-9.1. As the affidavit at issue alleged negligent acts or omissions by the hospital authority's co-defendant "professionals," and as the complaint further alleged that the

hospital authority was liable for the acts or omissions of such employee or agent "professionals" under the doctrine of *respondeat superior*, the Court of Appeals found that the trial court erred in dismissing the plaintiffs' complaint against the hospital authority pursuant to Sections 9-11-9.1 and 9-11-12(b)(6)[6]:

> On February 14, 1991, appellants filed a medical malpractice action alleging the February 19, 1989 wrongful death of Gregory A. Dozier. Attached to the complaint was a document entitled "Affidavit of George Podgorny, MD." *At least one negligent act or omission on the part of each defendant was set forth in the document. . . .*
>
> *We . . . consider whether appellants were required to attach a supporting expert affidavit to their complaint against the hospital authority, based inter alia on medical malpractice claims stemming from alleged acts of negligence by the authority's agents and employees.*
>
> O.C.G.A. § 9-11-9.1 pertinently provides that "[i]n any action for damages alleging *professional* malpractice, the plaintiff shall

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[6] "Under the Civil Practice Act a motion to dismiss a complaint for failure to state a claim should not be granted unless the averments in the complaint disclose with certainty that the plaintiff would not be entitled to relief under any state of facts that could be proved in support of the claim," *Union Camp Corp. v. Southern Bulk Industries, Inc.*, 193 Ga.App. 90, 386 S.E.2d 866 (1999) (citation omitted); *see also* O.C.G.A. § 9-11-12(b)(6) (1993).

be required to file with the complaint an affidavit of an expert." (Emphasis supplied.) In *Lamb v. Candler Gen. Hosp.*, 262 Ga. 70, 71(1), 635 413 S.E.2d 720, it was held that where professional skill and judgment are not involved, an affidavit under OCGA § 9-11-9.1 is not necessary. However, *in the case at bar it appears that all of the claims averred against the authority . . . were grounded upon the authority's liability for the acts and omissions of its agents and employees under the doctrine of* ***respondeat superior.***[9] These acts of omissions, as averred in the complaint, required the exercise of some form of medical skill and judgment on the part of the agents or employees concerned. . . .

. . .

[A]n appropriate affidavit is required not only when a particular claim is against a "professional" but also when a particular claim is grounded upon "professional malpractice," that is, an act or omission caused by a professional" which constitutes

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[9] On July 14, 2008, Plaintiffs filed their "Second Amended Complaint," wherein they assert that Defendant CHILDREN'S "fail[ed] to properly disseminate medical records . . . and/or [the] patient's medical chart . . . to the proper physicians," and that Defendant CHILDREN'S is responsible for any acts o[f] negligence of their employees in failing to properly disseminate the medical records of [N.S.] . . . and/or his medical chart . . . to the proper physicians . . . under [the doctrine of] *respondeat superior*." (Second Amended Complaint, ¶¶ 33-35.)

malpractice. The hospital authority not being a "professional," the affidavit requirement does not apply automatically as to any claim asserted against it. *Greene County Hasp. Auth. v. Turner,* 205 Ga.App. 213, 421 S.E.2d 715 and *Thornton v. Ware County Hosp. Auth.,* 205 Ga.App. 202, 421 S.E.2d 713. Rather, *the affidavit requirement applies against a hospital not only when liability is based upon the doctrine of* ***respondeat superior*** *but when it is further grounded upon the averment of acts of omissions requiring the exercise of professional skill and judgment by agents of employees who themselves are recognized as "professionals".* . . . Thus, to the extent that the complaint avers claims of liability, based on the doctrine of *respondeat superior,* arising from acts or omissions constituting malpractice by doctors, registered professional nurses, or other "professionals," as recognized by said statutes, an appropriate affidavit . . . was required under OCGA § 9-11-9.1. . . .

. . .

'[A] motion to dismiss "should not be granted unless the averments in the complaint disclose with certainty that the plaintiff would not be entitled to relief under any state of facts that could be proved in support of the claim," ' . . . As such certainty does not exist in this instance, *the trial court erred in dismissing appellants' complaint* ***in toto*** *as against the hospital authority.*

206 Ga.App. at 64-66 (emphasis added) (citations omitted); *see also, HCA Health Svcs. of Georgia, Inc. v. Hampshire,* 206 Ga.App. 108, 424 S.E.2d 293 (1992) (emphasis added) ("Appellees alleged and Northlake admitted in its answer that O.M. Arora, M.D., . . . was a member of Northlake's medical staff at the time of the surgery at issue. Appellees specifically alleged in their complaint that Dr. Arora (as one of the individual physician-defendants) was 'acting as [Northlake's] agent, . . . thereby setting forth a claim against Northlake under the theory of *respondeat superior.* A review of appellee's OCGA § 9-11-9.1 affidavit reflects that [plaintiff's expert] set forth specific acts of negligence allegedly committed by Dr. Arora. *Since Northlake's liability rests upon the theory of* ***respondeat superior****, 'appellees complied with the requirements of OCGA 9-11-9.1 by filing with the complaint affidavits which set forth the negligence of the professionals whose acts form the basis for [their] claim against the hospital.*"); *Thornton v. Ware County Hospital Authority*, 205 Ga.App. 202, 421 S.E.2d 713 (1992) (emphasis added) ("The hospital moved to dismiss the complaint on the grounds that neither of the affidavits filed by appellants set forth any negligent act of the hospital. Appellants subsequently amended their complaint to allege that the hospital was liable . . . under a theory of *respondeat superior. . . . We conclude that appellants complied with the requirements of OCGA § 9-11-9.1 by filing with the complaint affidavits which set forth the negligence of professionals whose acts form the basis for appellee's claim against the hospital.*"); *Tenet*, 277

Ga.App. at 902 (emphasis added) ("Tenet Healthcare and Tenet Healthsystem, some of whose employees allegedly committed the negligence, both moved to dismiss under O.C.G.A. § 9-11-9.1 on the ground that the [plaintiff's expert's] affidavit failed to specify an act of negligence against them as corporate entities. *This argument fails on its face, however, [as] the specification of negligent acts against their employees would suffice, as Gilbert was asserting liability under* ***respondeat superior***.").[10]

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[10] While Defendant CHILDREN'S correctly cites *Candler Hospital* and *Goins* for a contrary result, both such cases are distinguished on their facts. In *Candler Hospital*, "[t]he [O.C.G.A. § 9-11-9.1] affidavits *d[id]not specify any negligent act or omission by the agents or employees of Candler Hospital.* Nor d[id] they specify any facts upon which the malpractice claim against Candler Hospital is based. *In fact, the affidavits d[id] not even state that Candler Hospital's agents or employees were involved in the surgery*" which formed the basis for the plaintiff's action for medical malpractice. 224 Ga.App. at 426 (emphasis added).

Likewise, in *Goins*, the plaintiff's expert's affidavit made no reference to the defendant hospital, Georgia Baptist, or any acts or omissions by its employees or staff. "[R]eference to Georgia Baptist appears on the document only because the caption of the case precedes the affidavit. *The body of the affidavit contains no reference to Georgia Baptist or its staff.* . . . When examining the affidavit as a whole, the eleventh paragraph is clearly only a summary of the negligent acts *attributed to the defendant physicians* in the preceding six paragraphs. . . . The affidavit does not meet the requirements of the statute with regard to defendant Georgia Baptist. . . . " 227 Ga. At 526 (emphasis added).

Defendant CHILDREN'S O.C.G.A. § 9-11-9.1 motion to dismiss shall accordingly be denied.

Defendant Doctors

The question raised by the defendant doctors' O.C.G.A. § 9-11-9.1 motions to dismiss is whether Plaintiffs' affiant, Dr. David L. Schwartz, is "an expert competent to testify" in their respective medical specialties and subspecialties.[11]

> [F]or an affiant to constitute "an expert competent to testify" under O.C.G.A. § 9-11-9.1(a), the affiant's expertise must include knowledge of the standard of care applicable to the defendant-physician as to at least one of the matters on which the plaintiff's malpractice claim is based. This holding is mandated by the language of the statute that the expert affidavit submitted by the plaintiff must specifically set forth "at least one negligent act or omission" allegedly committed by the defendant-physician. . . .

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[11] Plaintiffs' expert, Dr. David L. Schwartz, is a board certified pediatric surgeon presently serving as an assistant clinical professor at Albert Einstein College of Medicine and at New York University Medical Center in New York. (Plaintiff's response to Defendants TROYER's and KEYES' motion, Exhibit "A" thereto.) Defendants TROYER and KEYES are neonatologists; Defendants THOMSEN and GOWER are board certified pediatric otolaryngologists. (Defendants THOMSEN's and GOWER's briet, p. 3; Defendants' TROYER's and KEYES' brief, p. 4.)

[T]he mere fact an affiant is an expert in his or her school of knowledge does not necessarily mean the expert is "competent to testify" under O.C.G.A. § 9-11-9.1(a). See *Piedmont Hosp. v. Milton*, 189 Ga. App. 563 (377 S.E.2d 198) (1988) (rejecting a medical doctor's affidavit against nursing personnel in part because it did not show that the medical doctor was an expert competent to testify "in the field of nursing"); *Milligan v. Manno*, 197 Ga. App. 171 (397 S.E.2d 713) (1990) (setting forth the general rule that a member of a school of practice other than that to which the defendant belongs is not competent to testify as an expert in a malpractice case). . . .

In *Milligan*, supra, this court discussed in the context of the O.C.G.A. § 9-11-9.1 affidavit the general rule excluding practitioners of one school of medicine from testifying against members of other schools and the exception to that rule, as set forth in *Sandford v. Howard*, 161 Ga. App. 495, 497(5) (288 S.E.2d 739) (1982), that "'[w]here there is proof by competent evidence that the methods of treatment are the same despite the difference in the nomenclature of the schools involved, the witness is competent to testify.' [Cit.]" The *Milligan* court then applied that exception to the affidavit required by O.C.G.A. § 9-11-9.1 and held that where the affidavit "establishes that the witness is a member of a different school of medicine

> than that practiced by the defendant but contains no evidence that the methods of treatment of plaintiff's condition are the same so as to bring the witness within the exception to the general rule that he is incompetent to testify[, then] the affidavit is legally insufficient." *Id.* at 172.

Chandler v. Koenig, 203 Ga.App. 684, 685-686, 417 S.E.2d 715 (1992).

On February 15, 2005, Code Section O.C.G.A. § 24-9-67.1 went into effect, codifying and statutorily clarifying the "expert competent to testify" requirement of O.C.G.A. § 9-11-9.1:

> in professional malpractice actions, the opinions of an expert, who is otherwise qualified as to the acceptable standard of conduct of the professional whose conduct is at issue, shall be admissible only if, at the time the act or omission is alleged to have occurred, such expert:
>
> > (1) Was licensed by an appropriate regulatory agency to practice his or her profession in the state in which such expert was practicing or teaching in the profession at such time; and
> >
> > (2) In the case of a medical malpractice action, had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:

(A) The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; or

(B) The teaching of his or her profession for at least three of the last five years as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in teaching others how to perform the procedure, diagnose the condition, or render the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; and

(C) Except as provided in subparagraph (D) of this paragraph: (i) Is a member of the same profession; (ii) Is a medical doctor testifying as to the standard of care of a defendant who is a doctor of osteopathy; or (iii) Is a doctor of osteopathy testifying

> as to the standard of care of a defendant who is a medical doctor; and
>
> (D) Notwithstanding any other provision of this Code section, an expert who is a physician and, as a result of having, during at least three of the last five years immediately preceding the time the act or omission is alleged to have occurred, supervised, taught, or instructed nurses, nurse practitioners, certified registered nurse anesthetist, nurse midwives, physician's assistants, physical therapists, occupational therapists, or medical support staff, has knowledge of the standard of care of that health care provider under the circumstances at issue shall be competent to testify as to the standard of that health care provider. . . .
>
> . . .
>
> An affiant must meet the requirements of this Code section in order to be deemed qualified to testify as an expert by means of the affidavit required under O.C.G.A. § 9-11-9.1.

O.C.G.A. § 24-9-67.1(c), (e) (Supp. 2005).[12]

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[12] The law enacting such statute pertinently provides in Section 15(b) that "[i]t is the intention of the General Assembly that . . . this Act shall apply to causes of action *pending on its*

(Continued on following page)

Review of the record and the parties' briefs regarding the various specialties and subspecialties involved provides the Court with insufficient information to determine whether Plaintiffs' expert Dr. Schwartz is in fact competent to testify against the doctor defendants in this case. As permitted by O.C.G.A. § 24-9-67.1(d), the Court will accordingly

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effective date, unless such application would be unconstitutional." Laws 2005, Act 1, § 15(b) (emphasis added).

Plaintiffs in a June 26, 2006 supplemental brief filed in opposition to Defendants THOMSON's and GOWER's motion to dismiss accordingly contend that such statute should not apply to their cause of action, which purportedly arose on or about March 12, 2002: "O.C.G.A. § 24-9-67.1, if applied to disqualify Plaintiffs' expert, will violate Plaintiffs' fundamental Constitutional rights of due process and access to the courts. Fundamental Constitutional rights require that every party to a lawsuit be afforded the opportunity to be heard and to present his claim or defense. . . . The Constitution of this State and of the United States of America guarantees to all persons due process of law and unfettered access to the courts." (Plaintiff's supplemental brief, p. 2) (citations omitted).

This Court cannot agree. Section 24-9-67.1 was in effect *for more than one year* prior to the February 23, 2006 execution of Plaintiffs' expert's affidavit and the March 24, 2006 filing of Plaintiffs' complaint. Plaintiffs accordingly knew (or should have known) that their expert affiant's qualifications would be judged under such statute. Further, Plaintiffs have failed to acknowledge, much less satisfy, the legal standards applicable to a constitutional challenge to a statute. *See Schneider v. Susquehanna Radio Corp.*, 260 Ga.App. 296, 581 S.E.2d 603 (2003). Finally, Plaintiffs' argument, if correct, would render all statutes which control or limit access to the courts (including O.C.G.A. § 9-11-9.1 unconstitutional, an illogical and incorrect result.

conduct a "pretrial hearing to determine whether [Dr. Schwartz] qualifies as an expert" competent to testify in this matter. Notice of such hearing date will be mailed separately to counsel, and the Court will reserve ruling on all unaddressed portions of the doctor defendants' motions to dismiss[13] (and of Plaintiffs' responses thereto) until after such hearing. (Supp. 2005).

BASED UPON THE FOREGOING,

Defendants WENDY A. TROYER's and WILLIAM C. KEYES' motion to dismiss (filed April 18, 2006) accordingly shall be, **and hereby is, DENIED in part and RESERVED in part;** Defendant CHILDREN'S HEALTHCARE OF ATLANTA'S O.C.G.A. § 9-11-9.1 motion to dismiss (filed April 19, 2006), shall be, **and hereby is, DENIED;** Defendant CHILDREN'S HEALTHCARE OF ATLANTA'S O.C.G.A. § 9-11-9.2 motion to dismiss (filed April 19, 2006 and supplemented May 4 and June 29, 2006) shall be, **and hereby is, DENIED;** Defendants JAMES THOMSON's and VERLIA GOWER's motion to dismiss (filed May 15, 2006) shall be, **and hereby is, DENIED in part and RESERVED in part;** and

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[13] As discussed above, that portion of the defendant doctors' motions to dismiss premised upon the contention that Plaintiffs have failed to comply with the medical records release authorization requirement of O.C.G.A. § 9-11-9.2 has been foreclosed by the Court of Appeals' recent holding in *Northlake Medical Center LLC v. Queen*, No. A06A0540 (Ga.Ct.App. July 13, 2008).

Plaintiffs' motion for protective order (filed May 26, 2006) shall be, **and hereby is DENIED as MOOT.**

This the 28 day of July, 2006.

/s/ Gail C. Flake
JUDGE GAIL C. FLAKE
DEKALB SUPERIOR COURT,
Division IV
STONE MOUNTAIN JUDICIAL
CIRCUIT

cc: Frank J. Klosik, Jr., Alina A. Krivitsky, counsel for Plaintiffs
Thomas E. Lavender, III, counsel for Defendant CHILDREN'S
Robert G. Tanner, counsel for Defendants TROYER and KEYES
Lori G. Cohen, Darcy B. Coty, counsel for Defendants THOMSEN and GOWER
H. Andrew Owen, Steven Salcedo, counsel for Defendants BRAND and BLEACHER

IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

TIMOTHY AND ANDREA SPACHT, individually and as next friend of N.S., a minor child,	:	
Plaintiffs,	:	
vs.	:	
CHILDREN'S HEATHCARE OF ATLANTA, INC., DR. WENDY A. TROYER, DR. WILLIAM G. KEYES, DR. JAMES THOMSEN, DR. VERLIA GOWER, DR. THEODORE BRAND, and DR. JOHN BLEACHER,	:	Civil Action File No. 06CV-4104-4
Defendants.	:	

POST-HEARING ORDER ON DEFENDANTS' MOTIONS TO DISMISS AND ON PLAINTIFF'S MOTION TO SUPPLEMENT AFFIDAVIT

(Filed Dec. 22, 2006)

This is a "failure to diagnose" medical malpractice case. In Georgia, every action alleging medical malpractice must at the time of its filing be accompanied by "an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist, and the factual basis for each such claim." O.C.G.A. § 9-11-9.1(a)

(2006). Failure to provide the requisite affidavit renders the plaintiff's case subject to dismissal on motion for failure to state a claim (*see* O.C.G.A. § 9-11-12(b)(6)), "except that the plaintiff may cure the alleged defect by amendment pursuant to Code Section 9-11-15 within 30 days of service of the motion alleging that the affidavit is defective," O.C.G.A. 9-11-9.1(b) (2006).[1]

On July 2, 2005, the Court entered an order denying in part and reserving in part Defendants WENDY A. TROYER's and WILLIAM G. KEYES' motion to dismiss (filed April 18, 2006) and Defendants JAMES THOMSON's and VERLIA GOWER's motion to dismiss (filed May 15, 2006):

> The question raised by the defendant doctors'[2] O.C.G.A. § 9-11-9.1 motions to dismiss is whether Plaintiffs' affiant, Dr. David L. Schwartz, is "an expert competent to testify" in their respective medical specialties and subspecialties.

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[1] Such Code section goes on to provide that "[t]he trial court may, in the exercise of its discretion, extend the time for filing said amendment . . . as it shall determine justice requires." O.C.G.A. § 9-11-9.1(b) (2006).

[2] As with its prior order on the motions to dismiss, the term "Defendant doctors" refers to the moving defendants Drs. TROYER, KEYES, THOMSEN, and GOWER. (Defendants Drs. BRAND and BLEACHER have not moved, nor have they joined in Defendant doctors' motions, to dismiss.) "Defendant hospital" refers to Defendant CHILDREN'S HEALTHCARE OF ATLANTA, INC., the only hospital defendant in this action.

. . .

> Review of the record and the parties' briefs regarding the various specialties and subspecialties involved provides the Court with insufficient information to determine whether Plaintiffs' expert Dr. Schwartz is in fact competent to testify against the doctor defendants in this case. As permitted by O.C.G.A. § 24-9-67.1(d), the Court will accordingly conduct a "pretrial hearing to determine whether [Dr. Schwartz] qualifies as an expert" competent to testify in this matter. Notice of such hearing date will be mailed separately to counsel, and the Court will reserve ruling on all unaddressed portions of the doctor defendants' motions to dismiss (and of Plaintiffs' responses thereto) until after such hearing. (Supp. 200[6]).

(Order, July 28, 2006, pp. 10, 14.)

Notice of the hearing data was duly provided to all parties by the Court in accordance with law on August 11, 2006, and this matter came on for hearing on September 21, 2006, with counsel for Plaintiffs, Defendants doctors, and Defendant hospital in attendance. None of the participating parties presented evidence or testimony at such hearing, and Plaintiff's expert did not appear. Prior to the hearing, however, Plaintiffs on September 18, 2006 filed their "Motion to Supplement Affidavit," which attaches as "Exhibit A" a supplemental affidavit from Plaintiff's expert executed on September 11, 2006 and which sets out

additional information regarding his qualifications as an expert "competent to testify" in this matter.

Plaintiffs' modest to supplement expert affidavit

Although the Court in accordance with Georgia law may exercise its discretion to consider an untimely supplement to an O.C.G.A. § 9-11-9.1 expert affidavit "as it shall determine justice requires," neither Plaintiffs' "Motion to Supplement" nor the evidence of record provides the Court with any basis upon which to do so. Pursuant to Section 9-11-9.1(b), Plaintiffs could have amended their expert's affidavit *as a matter of right* "within 30 days of the service of the motion alleging that the affidavit is defective." Defendants Drs. TROYER's and KEYES' motion challenging the sufficiency of such affidavit was served upon Plaintiffs by mail on April 18, 2006, and Defendants Drs. THOMSON's and GOWERS' motion on the same issue was likewise served upon Plaintiff on May 15, 2006, making any such amendment due to be filed no later than June 14, 2006.[3]

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[3] Although not abundantly clear, it appears that Plaintiffs are operating under the mistaken belief that they may amend their expert's affidavit as a matter of right at any time: "When an expert's affidavit is filed contemporaneously with the Complaint, a plaintiff is allowed to supplement the affidavit if its sufficiency is challenged." (Plaintiffs' motion, p. 1) (citation omitted). Despite the title of their motion, Plaintiffs do not cite to or acknowledge therein the relevant language of Section 9-11-9.1(b), do not request that the Court allow the amendment or exercise its discretion in their favor to allow the amendment, or

(Continued on following page)

But Plaintiffs did not attempt to amend such affidavit until September 18, and although they were aware that a hearing on this specific issue was set for September 21, served their motion and supplemental affidavit *by mail* upon defendants. Not surprisingly, none of the defendants received notice of or had an opportunity to review the supplemental affidavit until immediately prior to the 9 a.m. hearing (and even then did not obtain, their own copies thereof, having instead to "share" Plaintiffs' counsel's copy among three separate defense counsel) with the predictable result that none of the movants had the opportunity to argue or brief whether the affidavit as supplemented establishes that Plaintiffs' expert is "competent to testify" against the defendant doctors in this matter.

Noticeably absent from Plaintiff's motion and supplemental affidavit is any explanation for this delay. The affiant is Plaintiffs' expert witness, retained by Plaintiffs no later than February 2006, and the information about his qualifications with which he now supplements his original affidavit is not "newly discovered." To the contrary, whether or not such "expert" is properly qualified within the meaning of Sections 9-11-9.1 and 24-9-67.1 to provide an initial affidavit is an issue which the law charges

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contend that "justice requires" the amendment, nor do they interpose any request for relief other than "WHEREFORE, Plaintiffs respectfully request that the Court deny Defendant's Motions to Dismiss." (Plaintiffs' motion, p. 4.)

plaintiffs in professional negligence actions to inquire into *prior* to filing their complaint, which responsibility they ignore at their own peril.

When Plaintiffs' unexplained delay in filing their supplemental affidavit is considered in conjunction with the lack of notice to the defendants discussed above, it gives fair support to the implication that Plaintiffs' late filing of their expert's supplemental affidavit was intended not to assist the Court in ruling upon the substantive issues raised by the doctor defendants' motions to dismiss, but to prevent such defendants from being heard on the sufficiency of the supplemental affidavit as it pertains to Plaintiffs' expert's qualifications.[4]

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[4] That this was in fact Plaintiffs' purpose is bolstered by the fact that *no other avenue* for bringing such evidence before the Court could possibly provide plaintiffs with such an advantage. Had Plaintiffs amended their affidavit within 30 days of the motions to dismiss as O.C.G.A. § 9-11-9.1(b) permits, or moved the Court one or even two months later to permit supplementation of their expert's affidavit. Defendants would have had the opportunity to challenge the sufficiency of the supplemental affidavit *prior to or at the September 21 hearing on this issue*. Had Plaintiffs deposed their expert in order to submit his deposition testimony into evidence, Defendants would have had the opportunity to attend such deposition and cross-examine Plaintiffs' expert as to his qualifications *prior to the hearing on such issue*. Had Plaintiffs called their expert to testify, Defendants would have had the opportunity at the hearing to cross-examine him and to present their own witnesses or other evidence in rebuttal.

Defendants have not, however, filed any opposition to Plaintiff's motion to amend their expert's affidavit. Instead, on the day of and immediately prior to the hearing, Defendants GOWER and THOMSEN filed their own "expert" affidavits, wherein they opine that pediatric surgeons "do not have the same education, training, experience, or expertise in assessing complex airways to determine the etiology of an airway obstruction such as that evidenced in [N.S.]." (Affidavit of Verlia Gower, ¶ 16; Affidavit of James Thomsen, ¶ 18.) Plaintiffs have not moved to exclude these affidavits on any grounds.

Accordingly, the Court will grant Plaintiffs' motion to amend their expert affidavit, and will also consider all of the evidentiary materials of record as of the date of this Order in ruling on Defendants' motions to dismiss.

Plaintiffs' expert's affidavit – Before and After

Having found in its July 28, 2006 Order that Plaintiffs' expert's initial affidavit was insufficient as a matter of law to establish that such expert is "competent to testify" against the defendant doctors in this case, the Court examines the relevant changes[5]

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[5] It is important here to note that the Court has previously determined that the evidentiary material of record as of July 28, 2006, which includes Plaintiffs' expert's *original* affidavit, "provide[d] insufficient information to determine whether Plaintiffs' expert Dr. Schwartz is in fact competent to testify against

(Continued on following page)

effected by Plaintiffs' expert's supplementation and amendment of his affidavit, which changes are italicized below:

AFFIDAVIT OF
DAVID L. SCHWARTZ, M.D., F.A.C.S., F.A.A.P.

STATE OF NEW YORK
COUNTY OF _____

BEFORE ME, the undersigned officer duly authorized to administer oaths, came David L. Schwartz M.D., F.A.C.S., F.A.A.P., who after being duly sworn, states the following:

1.

My name is David L. Schwartz and I make this supplemental affidavit based on my knowledge, training, and experience as a skilled board certified pediatric surgeon. As a Pediatric surgeon, I operate on children whose development ranges from the newborn stage through the teenage years. I am primarily concerned with the diagnosis, preoperative, operative, and postoperative management of surgical problems in children.

2.

As a board certified Pediatric Surgeon, I have the training, knowledge, and experience to diagnose and surgically manage children

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the doctor defendants in this case." (Order, July 28, 2006, p. 14 of 15.)

with vascular rings, which is the medical condition at issue in this case. My knowledge and experience in diagnosing and surgically managing children with vascular rings was gained from my extensive medical training and experience. I gained my medical school training and degree [1960-1964] at Albert Einstein School of Medicine. I performed my Internship and surgical residency 1964-1970 at Bronx Municipal Hospital Center. I performed my pediatric surgery residency and fellowship 1972-1974 at John Hopkins Hospital. I am board certified in pediatric surgery. I am assistant clinical professor in surgery at Albert Einstein College of Medicine, 1974-present. I am a clinical assistant professor at New York University Medical Center, 1978-present, I am in private practice for pediatric surgery, B.S.K. Surgical Associates, P.C., 1974-present.

3.

Every day I cooperate with all of the specialists involved in a child's medical care to determine whether surgery is the best option for the child. I regularly cooperate with neonatologists and pediatric otolaryngologists to manage surgical problems in children. A child with a vascular ring must be diagnosed immediately by neonatologists and/or pediatric otolaryngologists and then they must refer the child to a pediatric surgeon so that the pediatric surgeon may immediately evaluate the child for surgical division of the vascular ring.

4.

> Based upon over thirty years of experience in diagnosing and surgically managing children with vascular rings and upon a review of the certified medical records from Children's Healthcare of Atlanta which reflects the treatment that Dr. Troyer, Dr. Keyes, Dr. Gower, and Dr. Thomsen gave to [N.S.], it is my opinion that Dr. Troyer, Dr. Keyes, Dr. Gower, and Dr. Thomsen failed to exercise that degree fo skill and care ordinarily required by the medical profession in general under like conditions and similar circumstances. I have identified the following specific acts or omissions in support of this opinion. . . .[6]

(Supplemental Affidavit of David L. Schwartz, ¶¶ 1-4) (filed September 18, 2006).

Statutory standard

Until recently, Section 9-11-9.1 and its interpreting case law provided the legal standard for evaluation of an expert witness' qualification in a professional malpractice action. On February 16, 2005, Code Section O.C.G.A. § 24-9-67.1 went into

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[6] The remainder of Dr. Schwartz' affidavit addresses with specificity the alleged negligent acts or omissions of the doctor defendants. (Schwartz Amended Aff. ¶¶ 4-5.) As this information is not relevant to the question presently before the Court, i.e., whether Dr. Schwartz is competent to testify as an expert against the doctor defendants, it is not quoted herein.

effect, codifying and statutorily clarifying the "expert competent to testify" requirement of O.C.G.A. § 9-11-9.1:

> (c) *Notwithstanding . . . any . . . provision of law which might be construed to the contrary*, in professional malpractice actions, the opinions of an expert, who is otherwise qualified as to the acceptable standard of conduct of the professional whose conduct is at issue, *shall be admissible only if, at the time the act or omission is alleged to have occurred, such expert*:
>
> > (2) In the case of a medical malpractice action, had *actual professional knowledge and experience* in the area of practice or specialty in which the opinion is to be given *as the result of having been regularly engaged in*:
> >
> > > (A) The *active* practice of such area of specialty of his or her profession *for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge* as determined by the judge, in performing the procedure, *diagnosing the condition*, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; or
> >
> > > (B) The *teaching* of his or her profession *for at least three of the last five years* as an *employed* member of the faculty of an educational institution accredited in the teaching of such profession,

> *with sufficient frequency to establish an appropriate level of knowledge*, as determined by the judge, *in teaching others how to* perform the procedure, *diagnose the condition*, or render the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; and
>
> (C) Except as provided in subparagraph (D) of this paragraph: (i) Is a member of the same profession; (ii) Is a medical doctor testifying as to the standard of care of a defendant who is a doctor of osteopathy; or (iii) Is a doctor of osteopathy testifying as to the standard of care of a defendant who is a medical doctor. . . .
>
> . . .
>
> (e) *An affiant* ***must*** *meet the requirements of this Code section in order to be deemed qualified to testify as an expert by means of the affidavit required under O.C.G.A. § 9-11-9.1.*

O.C.G.A. § 24-9-67.1(c-e) (Supp. 2005) (emphasis added).[7]

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[7] As with Dr. Schwartz' supplemental affidavit, only the relevant portions of the statute are quoted below. For example, the fact that Dr. Schwartz "was licensed . . . to practice his profession" is not in dispute in this case, nor is the fact that the teaching Institutions with which he is affiliated are "accredited." O.C.G.A. § 24-9-67.1(c)(1), (2)(B) (Supp. 2006).

Application of statutory requirements to Dr. Schwartz' supplemental affidavit

Under the law as it existed prior to the enactment of Section 24-9-67.1, more specifically the case law interpreting the expert affidavit requirements of O.C.G.A. § 9-11-9.1, Dr. Schwartz would almost certainly be considered an "expert . . . qualified as to the acceptable standard of conduct of the professional whose conduct is at issue. . . ." *Id.*; *see*

Section 24-9-67.1, however, requires more from a malpractice plaintiff than ever before in order for his O.C.G.A. § 9-11-9.1 expert to be deemed "qualified," and divides such experts into "practicing" or "teaching" categories. Compare O.C.G.A. § 24-9-67.1(c)(2)(A), (B) (Supp. 2006). As Plaintiffs' expert may qualify as either, the Court reviews both applicable standards under the new statute.

The "practicing" expert witness in a failure-to-diagnose medical malpractice must now not only be engaged in the practice of medicine, but the "*active* practice" of medicine, "for *at least* three of the last five years" relative to the data the alleged malpractice is claimed to have occurred.[8] *Id.* It is not enough that the plaintiff's expert be experienced in diagnosing the condition alleged to have been overlooked by

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[8] Based upon the allegations of Plaintiffs' complaint, the failure to diagnose N.' "vascular ring" occurred on or about March 12, 2002. (Original Complaint, ¶ 8; original Affidavit of David L. Schwartz, ¶ 2(A)).

the defendant, under Section 24-9-67.1, plaintiff's expert must now establish that he has done so "with *sufficient frequency* to establish an appropriate level of knowledge" to the Court. O.C.G.A. § 24-9-67.1(c)(2)(A) (Supp. 2006) (emphasis added).

By contrast, a "teaching" expert in a "failure to diagnose" medical malpractice action must establish not only that he is on the faculty of an accredited medical teaching institution, but that he is an "*employed*," not merely honorary, member of such faculty, that he has been so "for *at least* three of the last five years" relative to the date the alleged failure to diagnose took place, and more specifically, establish that he has been "teaching others how to . . . diagnose the condition" alleged to have been misdiagnosed by the defendants, once again "*with sufficient frequency* to establish an appropriate level of knowledge" to the Court. *Id.* (emphasis added).

Addressing the "teaching" basis for qualification first, while review of Dr. Schwartz' affidavit as supplemented[9] establishes that he is "present[ly]" a

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[9] The *only* evidence of Dr. Schwartz' qualifications as an expert in this case come from his original and supplemented O.C.G.A. § 9-11-9.1 "expert" affidavit, and the unauthenticated copy of his curriculum vitae attached as Exhibit "A" to Plaintiff's May 18, 2006 response to Defendants' TROYER's and KEYES' motion to dismiss. (The latter does reflect that Dr. Schwartz received an award for "Best Clinical Teaching" at N.Y. Hospital Medical Center in Queens, but that award was made in 1996.) The record contains no deposition transcript or other testimony relevant to his qualifications, and as noted above, Dr. Schwartz

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member of the faculty at both Albert Einstein College of Medicine and the New York University Medical Center, nothing therein indicates that he is or was an "employed" member of either faculty, that he was actually *teaching* at either institution as an employed faculty member, that he had so taught "for at least three of the last five years" relative to the date the alleged failure to diagnose took place, or most importantly, that he there has taught others to "diagnose the condition . . . which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue," *and* "with sufficient frequency to establish an appropriate level of knowledge" to the Court. O.C.G.A. § 24-9-67.1(c)(2)(B) (Supp. 2006).

In fact, Plaintiff's expert's affidavit(s), and the record itself, are completely silent when it comes to the time, place, subject matter and frequency of teaching by Plaintiff's expert. That being the case, Plaintiff's expert cannot be deemed competent to testify as a "teaching expert" against the doctor defendants in this case pursuant to O.C.G.A. § 24-9-27.1(c)(2)(B) (Supp. 2006).

Does Plaintiff's expert then qualify as a "practicing expert" under Section 24-9-27.1(c)(2)(A)? Dr. Schwartz' affidavits are certainly more specific as to the frequency of his medical practice: "*Every day* I

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did not appear and testify at the September 21 hearing on this matter.

cooperate with all of the specialists involved in a child's medical care to determine whether surgery is the best option for the child. I *regularly* cooperate with neonatologists and pediatric otolaryngologists to manage surgical problems in children." (Schwartz Supp. Aff. ¶ 3) (emphasis added). Certainly it appears that Plaintiffs have satisfied the "three of the last five years" practice requirement as their expert states he has "over thirty years of experience in diagnosing and surgically managing children with vascular rings . . ." (Schwartz Supp. Aff., ¶ 4); *see Canes v. Al-Jabi*, slip op. at ___ (Ga.Ct.App. Nov. 20, 2006).[10]

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[10] Kaminer and the Board contend that the trial court erred in finding that Sleasman, Milligan, and Shore, are qualified under O.C.G.A. § 24-9-67.1(c) to testify regarding the standard of care governing Kaminer's professional conduct because the witnesses are not regularly engaged in the active practice of Kaminer's specialty, pediatric cardiology. . . . Under the statute, it is the expert's qualifications, vis a vis the area of practice or specialty in which the expert is providing the opinion, rather than the defendant doctor's specialty or area of practice, that controls whether the trial court should allow the expert's testimony.

. . .

In this case, the trial court was authorized to find that Canas's experts are offering opinions in the area of practice or specialty of pediatric medicine.

As the trial court noted, for the previous five years, Sleasman has practiced in the fields of pediatrics, allergy and Immunology, and diagnostic and laboratory immunology; Milligan has practiced in the area of pediatrics, specializing in primary care; and Shore has practiced in pediatrics, specializing in infectious diseases. Thus, the record supported the trial court's finding that each of these witnesses has

(Continued on following page)

But Plaintiff's expert, and the record itself, is silent as to *when* within the last thirty years Dr. Schwartz has "diagnose[d] the condition" which the doctor defendants in this case are alleged to have wrongfully failed to diagnose – specifically, the "vascular ring." O.C.G.A. § 27-9-67.1(c)(2)(A) (Supp. 2006). As indicated by the previous discussion, it is no longer sufficient for Plaintiff's expert to testify simply that he has diagnosed this condition at some point in the past. Pursuant to Section 24-9-67.1, Plaintiff's expert must have made such a diagnosis *within* "the last five years" relative to the date of the alleged failure to diagnose *and* "with sufficient frequency to establish an appropriate level of knowledge. . . ." (Supp. 2006). As the Court is unable to determine from the record before it that Dr. Schwartz has made even *one* diagnosis of a "vascular ring" within five years of March 12, 2002, he cannot alternatively qualify as a "practicing expert" in this case. *Id.*

This finding is consistent with the September 21, 2006 affidavits of doctor defendants GOWERS and THOMSEN, wherein they testify that "pediatric surgeons do not have the same education, training,

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been actively engaged in the practice of pediatrics for at least three of the last five years with sufficient frequency to establish an appropriate level of knowledge concerning the practice of pediatric medicine. The trial court did not abuse its discretion in denying the motions to disqualify Cana's experts based on OCGA § 24-9-67.1(c).

Id., slip op. at 21, 22.

experience or expertise [as do pediatric otolaryngologists] in assessing complex airways to determine the etiology of an airway obstruction. . . ." (Gowers Aff., ¶ 16; Thomsen Aff., ¶ 18.) Indeed, it is consistent with Dr. Schwartz' *own* testimony in his supplemental affidavit:

> A child with a vascular ring *must be diagnosed immediately by neonatologists and/or pediatric otolaryngologists* and then ***they must refer the child to a pediatric surgeon*** so that the pediatric surgeon may immediately evaluate the child for surgical division of the vascular ring.

(Schwartz Supp. Aff., ¶ 3) (emphasis added). It thus appears that Dr. Schwartz' area of expertise exists not in *diagnosing* vascular rings, but with their surgical remediation *after* diagnosis by another, differently-qualified professional.

Plaintiffs strenuously argue that their expert need not practice in the same specialty or subspecialty as the defendant doctors to qualify as an "expert" pursuant to Sections 34-9-67.1 and 9-11-9.1, but this is not the import of the Court's holding. As with cases involving the qualifications of experts under O.C.G.A. § 9-11-9.1 decided prior to the enactment of O.C.G.A. § 24-9-67.1, the question presented here is one of "overlap." *Cotten v. Phillips*, 280 Ga.App. 280, 633 S.E.2d 655 (2006) ("Under the statute, it is the expert's qualifications, rather than the defendant doctor's specialty or area of practice, that controls whether the trial court should allow the expert's

testimony."). A plaintiff's expert in a medical malpractice case need not be a member of the same specialty or subspecialty as the doctor defendants, but his area of practice must relevantly "overlap" with that of the defendants, or he is not competent to testify against them. *Abramson v. Williams*, 281 Ga.App. 617, 636 S.E.2d 765 (2006); *Tucker v. Talley*, 267 Ga.App. 820, 600 S.E.2d 778 (2004). Subsections 3(A) and (B) of Section 24-9-67.1 may thus be viewed as the Legislature's codification of that "overlap" first recognized in the case law interpreting O.C.G.A. § 9-11-9.1.

By failing to make the showing required by either subsection (c)(2)(A) *or* (c)(2)(B) of O.C.G.A. § 24-9-67.1, plaintiffs have failed to show that their expert's medical practice "overlaps" that of the doctor defendants, and he is accordingly not qualified to testify against them.

Conclusion

While the dismissal of a medical malpractice case on a challenge to the sufficiency of the O.C.G.A. 9-11-9.1 expert's affidavit is not favored in the law, "only those individuals possessing like expertise, obtained through commensurate education or training, are competent to testify as to whether a professional defendant complied with or deviated from the applicable standard of professional conduct. . . ." *Harrell v. Lusk*, 263 Ga. 895, 896, 439 S.E.2d 896 (1994).

Despite being put on notice by the Court on July 28, 2006 that the record "provide[d] the Court with insufficient information to determine whether Plaintiffs' expert Dr. Schwartz is in fact competent to testify against the doctor defendants in this case," being given an opportunity on September 21, 2006 to introduce additional evidence on this issue, and the Court's consideration of Plaintiffs' supplement to their expert's affidavit despite its untimeliness, Plaintiffs have failed to submit evidence sufficient to establish that their expert witness, Dr. David L. Schwartz, is competent to testify against the doctor defendants in this case. O.C.G.A. §§ 24-9-67.1 (Supp. 2006), 9-11-9.1 (2006).

Accordingly, based upon the foregoing, Plaintiffs' Motion to Supplement Affidavit (filed September 18, 2006) shall be, **and hereby is, GRANTED**, and Defendants WENDY A. TROYER's and WILLIAM G. KEYES' motion to dismiss (filed April 18, 2006) and Defendants JAMES THOMSON's and VERLIA GOWER's motion to dismiss (filed May 15, 2006), *as reserved in part in the Court's July 28, 2006 Order,* shall be, and hereby are **GRANTED**.

This the 22nd day of December, 2006.

/s/ Joan F. Roach
JUDGE JOAN F. ROACH, by designation
DEKALB SUPERIOR COURT, Division IV
STONE MOUNTAIN JUDICIAL CIRCUIT

cc: Frank J. Klosik, Jr., Alina A. Krivitsky, counsel for Plaintiffs
Thomas E. Lavender, III, counsel for Defendant CHILDREN'S
Robert G. Tanner, counsel for Defendants TROYER and KEYES
Lori G. Cohen, Darcy E. Coty, counsel for Defendants THOMSEN and GOWER
H. Andrew Owen, Steven Salcedo, counsel for Defendants BRAND and BLEACHER

Court of Appeals

of the State of Georgia

ATLANTA, Nov. 29, 2007

The Court of Appeals hereby passes the following order:

A07A1531. TIMOTHY SPACHT, ET AL. v. WENDY TROYER, ET AL.

The above appeal was docketed in this Court on April 5, 2007 and assigned to the Second Division, Johnson PJ, Phipps and Mikell JJ. Because of a dissent within the Second Division, the case shall be decided by the Second Division, the Third Division and a seventh judge. (OCGA §15-3-1(c)(1)).

The Honorable Debra Bernes, Judge of the Third Division of the Court of Appeals of Georgia, has recused in the above appeal. Therefore, the Honorable Gary B. Andrews, Presiding Judge of the First Division of the Court of Appeals of Georgia, is hereby assigned to the Third Division for the purpose of determining the above appeal.

The above appeal was docketed as an April 2007 Term case in this Court and shall be disposed of by the Court on or before the conclusion of the September 2007 Term.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta Nov. 29, 2007

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

/s/ William Z. [Illegible]

Court of Appeals

of the State of Georgia

ATLANTA, DECEMBER 14, 2007

The Court of Appeals passed the following order

Case No. A07A1531

TIMOTHY SPACHT ET AL V. WENDY TROYER ET AL

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta DEC 14, 2007

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

/s/ William Z. [Illegible]

Court of Appeals

of the State of Georgia

ATLANTA, Dec. 14, 2007

The Court of Appeals hereby passes the following order:

A07A1531. SPACHT, et al. v. TROYER, et al.

Pursuant to Rule 37(g), the court does not deem it appropriate that the Motion for Reconsideration should be voted on by twelve judges. The "Motion for Full Court Review" is denied.

Court of Appeals of the State of Georgia Clerk's Office, Atlanta

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta DEC 14, 2007

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ William Z. [Illegible], *Clerk*

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

Date: May 19, 2008

John Fox Daugherty
GREER, KLOSIK & DAUGHERTY
4651-A Roswell Road, N.E.
Atlanta, GA 303423048

Case No. S0 08C0714

TIMOTHY SPACHT et al. v. WENDY TROYER et al.

COURT OF APPEALS CASE NO. A07A1531

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur, except Hunstein, P.J., and Carley, J., who dissent.

Therese S. Barnes, Clerk

SUPREME COURT OF GEORGIA

Case No. S08C0714 Atlanta, June 30, 2008

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

TIMOTHY SPACHT et al. v. WENDY TROYER et al.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Hunstein, P.J., and Carley, J., who dissent,

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Therese S. Barnes, *Clerk*

114

No. 08-423

Supreme Court, U.S.
FILED
DEC 2 - 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

TIMOTHY AND ANDREA SPACHT, Individually and as Next Friend of N.S., a Minor,

Petitioners,

v.

DR. WENDY A. TROYER, DR. WILLIAM G. KEYES, DR. JAMES THOMSEN, DR. VERLIA GOWER,

Respondents.

On Petition For A Writ Of Certiorari To The Georgia Supreme Court

SUPPLEMENTAL BRIEF AND APPENDIX

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SUPPLEMENTAL BRIEF AND APPENDIX

COME NOW Petitioners and briefly supplement their Brief in this case to explain the purpose of the contents of the supplemented appendix in this case.

The motions by respondents Troyer, Keyes, Thomsen and Gower are attached in the appendix to confirm that neither of those motions sought hearings pursuant to O.C.G.A. § 24-9-67.1(d). Further, their motions were moot by the time of oral hearing, pursuant to *Northlake Medical Center v. Queen,* 280 Ga. App. 510 (2006) with regard to the medical authorization issues; and *Cotten v. Phillips,* 280 Ga. App. 280, 633 S.E. 2d 655 (2006) and *Abramson v. Williams,* 281 Ga. App. 617, 636, S.E. 2d 765 (2007), with regard to the overlap issue and the issue of whether an expert is required to practice in the same specialty as that of the negligent Defendant doctor.

The Trial Judge's 15-page Pre-Hearing Order (already appended to this case at page 17 in Petitioner's original Application) shows that Judge Flake spent 15 pages detailing her inability to decide the overlap issue, and that the O.C.G.A. § 24-9-67.1(d) hearing referenced in the final page of that Order was clearly to resolve the overlap issue, and a *Daubert* or O.C.G.A. § 24-9-67.1(d) hearing was not requested by either party or the Court.

Judge Roach's Order of December 22, 2006, (already appended to the original Petition at page 39) shows that no *Daubert* request was made pursuant to O.C.G.A. § 24-9-67.1(d), no *Daubert* argument was

had, no *Daubert* analysis was done, and no *Daubert* evidence was presented at the hearing on Defendants' Motion to Dismiss.

The transcript of the hearing on Defendants' Motion to Dismiss shows that the issue argued by the parties was whether an expert was required to practice in the same specialty as that of the negligent Defendant doctor. As indicated, this issue was moot by the time of the hearing pursuant to *Cotten v. Phillips,* 280 Ga. App. 280, 633 S.E. 2d 655 (2006) and *Abramson v. Williams,* 281 Ga. App. 617, 636, S.E. 2d 765 (2007), *supra.*

The "hearing" pursuant to O.C.G.A. § 24-9-67.1(d) or *Daubert,* which was the basis for the Georgia Court of Appeals' overnight internal reversal in this case, manifestly *never* occurred.

The Petitioners respectfully suggest this case should be remanded to the Trial Court, to at least conduct the non-existent "hearing" upon which the Georgia Court of Appeals dismissed this case.

THIS 2nd day of December, 2008.

Respectfully submitted,

GREER, KLOSIK, DAUGHERTY,
SWANK AND MCCUNE
ROBERT J. MCCUNE
State Bar No.: 487173
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State Bar No.: 425300
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IN THE SUPERIOR COURT
OF DEKALB COUNTY
STATE OF GEORGIA

TIMOTHY AND ANDREA SPACHT, INDIVIDUALLY AND AS NEXT FRIEND OF N.S., A MINOR Plaintiffs, v. CHILDREN'S HEALTHCARE OF ATLANTA, INC., DR. WENDY A. TROYER, DR. WILLIAM G. KEYES, DR. JAMES THOMSEN DR. VERLIA GOWER, DR. THEODORE BRAND, DR. JOHN BLEACHER Defendants.	)	Civil Action No: Second Original

COMPLAINT FOR DAMAGES

(Filed March 24, 2006)

COMES NOW, Timothy and Andrea Spacht, Individually and as Next Friend of N.S., a minor, Plaintiffs, and file this their Complaint against Children's Healthcare of Atlanta, Inc., Dr. Wendy A. Troyer, Dr. William G. Keyes, Dr. James Thomsen Dr. Verlia Gower, Dr. Theodore Brand, Dr. John Bleacher individually and collectively, and in doing so, show the Court the following:

App. 2

1.

Defendant Children's Healthcare of Atlanta, Inc. is a corporation incorporated under the laws of Georgia, and which may be served by second original upon its registered agent, Corporation Service Company, 40 Technology Pkwy South, #300, Norcross, Gwinnett County, Georgia, 30092. This Defendant is subject to the venue and jurisdiction of this Court.

2.

Defendant Dr. Wendy A. Troyer is a resident of XXXX XXXXXXXX XXX, Dunwoody, Dekalb County, Georgia, 30338, and may be served at that address. This Defendant is subject to the venue and jurisdiction of this Court.

3.

Defendant Dr. William G. Keyes is a resident of XXXX XXXXXXXX XXXXXXXXXX, Dunwoody, Georgia, Dekalb County, Georgia, 30338, and may be served at that address. This Defendant is subject to the venue and jurisdiction of this Court.

4.

Defendant Dr. James Thomsen is a resident of XXX XXXXXXXX XXXXX XXXX, XX, Atlanta, Fulton County, Georgia, 30342 and may be served by second original at that address. Defendant Dr. James

Thomsen is subject to the jurisdiction and venue of this Court.

5.

Defendant Dr. Verlia Gower is a resident of XXXX XXXXXX XXXX, Austell, Cobb County, Georgia, 30106 and may be served by second original at that address. Defendant Dr. Verlia Gower is subject to the jurisdiction and venue of this Court.

6.

Defendant Dr. Theodore Brand a resident of XXXX XXXXXX XXXXX XX, Marietta, Cobb County, Georgia 30068 and may be served by second original at that address. Defendant Dr. Theodore Brand is subject to the jurisdiction and venue of this Court.

7.

Defendant Dr. John Bleacher is subject to the jurisdiction and venue of this Court and may be served by second original at 5455 Meridian Mark Road, Suite 570, Atlanta, Fulton County, GA 30342.

COUNT I

8.

This action is one for professional malpractice in which one or more of the Defendants have failed to exercise the required degree and standard of care

causing injury and permanent damage to N.S., all of which could have been avoided if one or more of the Defendants recognized and treated by division, the vascular ring identified on the results of a March 12, 2002 CAT scan.

9.

Plaintiffs, pursuant to O.C.G.A. §9-11-9.1, have attached as Exhibit "A" their Affidavit specifically setting forth at least one negligent act or omission claimed to exist, and the factual basis for each claim.

10.

Defendant Children's Healthcare of Atlanta Inc. held out Defendants Wendy Troyer, William Keyes, Dr. James Thomsen, Dr. Verlia Gower, Dr. Theodore Brand and Dr. John Bleacher as being employees, giving its patients a reasonable belief that said Defendants were acting as agents or employees at all times herein, and Defendant Children's Healthcare of Atlanta Inc. is responsible for any acts or negligence of Defendants Wendy Troyer William Keyes, James Thomsen, Verlia Gower, Theodore Brand and John Bleacher

11.

The records from Children's Healthcare of Atlanta, including the CAT scan taken on March 12, 2002 reveal that N.S. had a vascular ring which

encircled his trachea and esophagus, thus preventing him from getting sufficient oxygen to his lungs, and being able to swallow.

12.

The March 12, 2002 CAT scan established that N.S. suffered from the most common type of vascular ring, a right aortic arch with aberrant left subclavian. This is an abnormal arrangement of vessels in the chest that encircle and compress the trachea and esophagus.

13.

The symptoms suffered by N.S., airflow difficulty, noisy respiration, swallowing difficulty, and failure to thrive were a direct result of the compression caused by the vascular ring.

14.

A vascular ring is surgically divided in all symptomatic patients. To avoid serious complications such as sudden death or significant tracheal or bronchial damage, surgery should not be delayed, especially in patients with symptoms of airway compression such as N.

15.

N.S. treating physicians named as Defendants herein ignored and/or failed to read the CAT scan results and proceeded with an unnecessary tracheotomy, salivary gland excision, nissen fundoplication, and g tube, causing N.S. severe pain and permanent damage, all of which could have been avoided if one or more of the Defendants recognized and treated by division, the vascular ring identified on the results of the March 12, 2002 CAT scan.

16.

Wendy Troyer and William Keys [sic], who were working at Children's Healthcare on March 12, 2002, and who had ordered the CAT scan for N.S., failed to read and act upon the results of the CAT scan, which established that N.S. suffered from a vascular ring.

17.

Dr. Thomsen failed to read or act upon the results of the CAT scan which established that N. suffered from a vascular ring, and kept in place an unnecessary tracheotomy, referring to N. as tracheotomy dependent.

18.

N.S. lived with a tracheotomy tube in place for the first two and a half years of his life. As a result, he could not suck, swallow, eat or talk. He had home

nursing care 12 hours a day 7 days a week. He required frequent assessments and vital signs, he needed breathing treatments every 6 hours, 4 hours if he was sick, and his tracheostomy needed suctioning every 5 minutes, or less when he was awake. His tracheostomy ties had to be changed at least 2 times a day and his tracheostomy had to be removed completely and replaced at least 2 times a week, at home. N. required physical therapy, oral therapy and speech therapy two times a week. He is almost four now and still requires therapy to learn how to eat and swallow his food properly.

19.

When Dr. Kanter divided the vascular ring two and a half years later on July 13, 2004, he stated in his operative notes that he divided the vascular ring after he "reviewed the old CAT scan which suggested a vascular ring." At the same time, N. was decannulated.

20.

Not only was N. not tracheostomy dependent, the tracheostomy was never required.

21.

Dr. Brand ignored the results of the CAT scan and performed an Open Nissen Fundoplication and Gastrostamy to prevent reflux.

22.

On October 18, 2002, Dr. Gower performed a submandibular gland excision and parotid duct ligation because N. could not swallow his own oral secretions. This is a major procedure which N. did not need, had the vascular ring been identified and divided this surgery could have been avoided. Surgical division of the vascular ring would have fixed the root cause of the problem by alleviating the compression on his esophagus.

23.

Defendants Children's Healthcare of Atlanta, Inc., Dr. Wendy Troyer, Dr. William Keyes, Dr. James Thomsen, Dr. Verlia Gower, and Dr. Theodore Brand negligently failed to follow generally accepted and customary medical practices and failed to exercise the degree of care generally employed by medical professionals under similar conditions and like surrounding circumstances by failing to diagnose and treat by surgical division and/or refer Plaintiff N.S. elsewhere for proper treatment of his vascular ring.

24.

Plaintiffs show that the negligence of the Defendants was the proximate cause of Plaintiff N.S.'s permanent damage and injuries as caused by the unnecessary procedures that he underwent because of Defendant's [sic] failure to properly treat his vascular ring.

25.

Plaintiffs show that as a result of the negligence of Defendants, Plaintiff N.S. has suffered and continues to suffer pain, physical, mental and emotional disability and will continue to suffer such pain and suffering in the future because of the permanent damage caused by the unnecessary procedures that he underwent.

COUNT II

26.

Plaintiffs incorporate by reference Paragraphs 1 through 25 of Plaintiffs' Complaint as though the same were specifically set forth herein.

27.

Plaintiff Timothy and Andrea Spacht are the mother and father of Plaintiff N.S.

28.

By reason of Defendants' Children's Healthcare of Atlanta, Inc., Dr. Wendy A. Troyer, Dr. William G. Keyes, Dr. James Thomsen Dr. Verlia Gower, Dr. Theodore Brand, Dr. John Bleacher negligent conduct, and the injuries suffered and sustained by Plaintiff N.S. as a direct and proximate result thereof, Plaintiffs Timothy and Andrea Spacht have been deprived of their son's society and companionship and such

deprivation will continue to the general damage of Plaintiffs Timothy and Andrea Spacht.

29.

By reason of Defendants' negligent conduct, Plaintiffs Timothy and Andrea Spacht have incurred medical expenses and bills on behalf of their son N.S. and it appears that such will continue to the damage of Plaintiffs Timothy and Andrea Spacht.

30.

Defendants are therefore jointly and severally liable to Plaintiffs in an amount to be proven by the evidence at trial.

WHEREFORE, Plaintiffs prays [sic] for the following:

(a) That Plaintiffs Andrea Spacht and Timothy Spacht recover on behalf of N.S. judgment against Defendants in an amount in excess of $10,000 for the injuries and pain and suffering of N.S., past present and future;

(b) That Plaintiffs Andrea Spacht & Timothy Spacht have judgment against Defendants jointly and severally in an amount in excess of $10,000 for loss of consortium services and medical expenses past and future;

(c) For trial by jury;

(d) For the costs of this action to be assess [sic] against Defendants; and

(e) For such other relief as this Court deems just and proper.

THIS 22nd day of March, 2006.

GREER, KLOSIK, DAUGHERTY, SWANK AND MCCUNE

BY: /s/ Alina Krivitsky
FRANK J. KLOSIK, JR.
State Bar No.: 425300
ALINA A. KRIVITSKY
State Bar No.: 142056
Attorneys for Plaintiffs

4651-A Roswell Road
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(404) 252-2020

AFFIDAVIT OF DAVID L. SCHWARTZ, M.D., F.A.C.S., F.A.A.P.

STATE OF NEW YORK
COUNTY OF _____

BEFORE ME, the undersigned officer duly authorized to administer oaths, came David L. Schwartz M.D., F.A.C.S., F.A.A.P., who after being duly sworn, states the following;

1.

My name is David L. Schwartz, and I give this affidavit based on my review of certified medical records from Children's Healthcare of Atlanta concerning the treatment of N.S. from January 15, 2002 until July 13, 2004, which include the following: summary history and physical, anesthesia record, preoperative and postoperative reports and records, post operative orders, preoperative checklists, admission records, patient's history, orders, physician's progress, nurses reports, clinic notes, diagnostic reports and examinations, including laboratory reports, x-ray reports, CAT scan reports, symptomology review.

2.

Based upon my review and analysis of the certified records of Children's Healthcare of Atlanta, it is my opinion with a degree of medical certainty that there were deviations from the acceptable standard of

care by Dr. Troyer, Dr. Keyes, Dr. Thomsen, Dr. Gower, Dr. Brand, Dr. Lewis and Dr. Bleacher in the following manner:

(A) Wendy Troyer and William Keys [sic], who were working at Children's Healthcare on March 12, 2002, and who had ordered a CAT scan for N.S., failed to read and act upon the results of CAT scan, which established that N.S. suffered from a vascular ring, of which he had the most common type, a right aortic arch with aberrant left subclavian. In this condition, an aberrant origin of the left subclavian artery is present, which originates as the last branch of the aortic arch (distal to the right subclavian artery). The ring is completed by a left-sided ductus arteriosus (or its remnant ligamentum arteriosum) passing from the aberrant left subclavian artery to the proximal left pulmonary artery. It is an abnormal arrangement of vessels in the chest that encircle and compress the trachea and esophagus. The symptoms suffered by N.S., airflow difficulty, noisy respiration, swallowing difficulty, and failure to thrive were a direct result of this compression, and the diagnosis should have been clear and surgical division should have been scheduled on March 12, 2002, the date of the CAT scan. It is my opinion that there is absolutely no reason why this should not have been done when symptomology was clear and definitive imaging results were in hand.

(B) The bilateral submandibular gland excisions and bilateral parotid duct ligations were unnecessary procedures that could have been avoided. Surgical division of the vascular ring would have fixed the root cause of the problem by alleviating the compression on his esophagus, thus allowing N. to swallow correctly. Dr. Gower should have reviewed the history, including all radiology reports prior to performing the bilateral mandibular gland excision and bilateral parotid duct ligations. If she had reviewed the March 12, 2002 CAT scan report, she would have seen that N. suffered from a vascular ring and she could have avoided this procedure and all of the negative side effects that are associated with this procedure.

(C) The establishment of a surgical tracheostomy would have been avoided if Dr. Thomsen recognized that N.'s presentation was a consequence of his vascular ring. As a result of this serious misstep, this child had an unnecessary tracheostomy and all the associated problems of a chronic tracheostomy in a very young child (i.e., infection, aspiration, pneumonia, bleeding, difficulty in swallowing, failure to thrive and time lost in speech development). It should also be emphasized, that N. underwent several general anesthesias during which endoscopies were done in attempts to determine why they were unsuccessful in trying to remove the tracheostomy; the obvious reason that tracheostomy could not be removed was that the vascular ring causing N.'s airway obstruction

was not addressed in a timely fashion. It is of importance to note that during one of his bronchoscopies and esophagoscopies, the endoscopist noted that there was an external compression of the esophageal lumen. This too was a consequence of the vascular ring.

(D) Dr. Brand diagnosed GI reflux and performed a major procedure to prevent reflux, a Nissen Fundoplication and Pyloroplasty. If he had reviewed the March 12, 2002 CAT scan report, he would have seen that N. suffered from a vascular ring and he could have avoided this procedure.

(E) Dr. Bleacher and Dr. Lewis performed a gastrostomy which would not have been needed had the vascular ring been identified and divided. If they had reviewed the March 12, 2002 CAT scan report, they would have seen that N. suffered from a vascular ring and they could have avoided this procedure.

3.

In summary N. had a vascular ring which encircled his trachea and esophagus and in so doing, interfered with the normal function of two strictures. Occlusion of the trachea prevented him from getting sufficient oxygen to his lungs and occlusion of the esophagus prevent [sic] him from being able to swallow. All of N.s' surgeries, the tracheostomy, the nissen fundoplication, the gastrostomy and the bilateral mandibular gland excision and bilateral parotid duct ligations were not necessary, had the original CAT

Scan results been recognized and treated by division of the vascular ring. The correction of the vascular ring on July 13, 2004 by Dr. Kantor [sic], at the same time he underwent open heart surgery, reversed all of his prior symptoms. Dr. Kantor [sic] stated that he "reviewed the old CAT Scan which suggested a vascular ring". In summary N. suffered many acute and chronic complications because of the failure to make a correct diagnosis of a vascular ring, even though this diagnosis was correctly made on a CAT Scan during his earliest admission to the hospital.

4.

I received my medical school training and degree 1960-1964 at Albert Einstein School of Medicine. I performed my internship and surgical residency 1964-1970 at Bronx Municipal Hospital Center. I performed my pediatric surgery residency and fellowship 1972-1974 at John [sic] Hopkins Hospital. I am board certified in pediatric surgery. I am an assistant clinical professor in surgery at Albert Einstein College of Medicine, 1974-present. I am a clinical assistant professor at New York University Medical Center, 1978-present, I am in private practice for pediatric surgery, B.S.K. Pediatric Surgical Associates, P.C., 1974-present. I am a fellow of American College of Surgeons and American Academy of Pediatrics, I am a member of American Medical Association, American Pediatric Surgical Association, Queens Pediatric Society, N.Y. State Surgical Society, N.Y. Pediatric Society and N.Y. Pediatric Surgical Society.

5.

I make this affidavit under oath, after having been duly sworn on the basis of my training and medical experience as applied to a review of the records listed above. This affidavit is executed for the purpose of being attached to and used in support of the Plaintiffs' medical malpractice complaint as required by O.C.G.A. § 9-11-9.1.

/s/ David L. Schwartz
David L. Schwartz,

Sworn to and subscribed
before me this 23rd day
of February, 2006.

/s/ Baharul Alam
NOTARY PUBLIC

BAHARUL ALAM
Notary Public, State of New York
No. 01AL8110452
Qualified in Queens County
Commission Expires May 24, 2008

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

TIMOTHY AND ANDREA SPACHT, INDIVIDUALLY AND AS NEXT FRIEND OF N.S., A MINOR, Plaintiffs, CHILDREN'S HEALTHCARE OF ATLANTA, INC., DR. WENDY A TROYER, DR. WILLIAM G. KEYES, DR. JAMES THOMSEN, DR. VERILA GOWER, DR. THEODORE BRAND, and JOHN BLEACHER, Defendants.	:	CIVIL ACTION FILE NO. 06CV4104-4

DEFENDANTS WENDY A. TROYER, M.D. AND WILLIAM G. KEYES, M.D.'S BRIEF IN SUPPORT OF MOTION TO DISMISS FOR VIOLATION OF O.C.G.A. § 9-11-9.1 AND § 9-11-9.2

COME NOW the Defendants Wendy A. Troyer, M.D. and William G. Keyes, M.D. and hereby file this Brief in Support of Motion to Dismiss, showing the Court as follows:

I. STATEMENT OF FACTS

On or about March 24, 2006, Plaintiffs filed the within matter, a medical malpractice suit. The allegations of the Complaint, including specifically paragraph 23, attempt to set forth a claim which can only be defined as one for medical malpractice, i.e., a failure to adhere to a reasonable degree of care and skill. The complaint was not accompanied by an affidavit of a competent expert as required by O.C.G.A. § 9-11-9.1, nor was it accompanied by an authorization allowing Defendants to secure all relevant medical records pursuant to O.C.G.A. § 9-11-9.2.

ARGUMENT AND CITATION OF AUTHORITY

THERE IS NO VALID AFFIDAVIT BEFORE THIS COURT SUCH AS REQUIRED BY O.C.G.A. § 9-11-9.1.

Under the laws enacted by the General Assembly of the State of Georgia in 2005, there are very specific requirements as to who can be an expert in medical practice litigation. In particular, O.C.G.A. § 24-9-67, as recently amended, requires that an expert have actual experience or knowledge in the same area of practice or field of specialty as the defendant against whom the expert's opinions are being offered. Moreover, the expert must have practiced in the same area of medicine for at least three of the last five years preceding his or her testimony, with specific experience in performing the procedure or treating the condition at issue. Such requirements apply both to

testifying experts and experts offering affidavit in support of a complaint.

In the within matter, even a brief perusal of the affidavit accompanying Plaintiffs' Complaint will show that the required expertise has not been demonstrated. While the affidavit states that he is a surgeon with the training expected in such specialty, nowhere does the affidavit indicate that this particular doctor has any experience in the field of neonatology.

Plaintiff's case thus runs afoul of that portion of O.C.G.A. § 9-11-9.1 which specifies that the plaintiff, upon filing a malpractice suit, is "required to file with the complaint the affidavit of an expert competent to testify . . . " This statutory requirement is straightforward and unambiguous. It is met only by filing an affidavit which demonstrates that the affiant is in fact an individual competent to testify under Georgia law.

To give opinions as an expert, an individual must possess the necessary qualification, which are specified by O.C.G.A. § 24-9-67.1. Subsection (a) of that statute establishes that its provisions "shall apply in all civil actions." Assuming that sufficient expertise exists, the individual may give opinions.

O.C.G.A. § 24-9-67.1(c) sets forth certain basic minimum standards to establish expertise. These requirements are unambiguous. The individual offering the opinion must have been, at the time of the alleged act about which the opinion is given,

licensed by an appropriate regulatory agency to practice his or her profession and, additionally, must have actual professional knowledge and experience in the area in which the opinion is given by virtue of having regularly engaged in "the active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the Defendant whose conduct is at issue."

That the dictates of this statute are not mere verbiage or extraneous matters foreign to the requirements of O.C.G.A. § 9-11-9.1 is specified by subsection (e) of O.C.G.A. § 24-9-67.1, which states as follows:

> An affiant must meet the requirements of this code section in order to be deemed qualified to testify as an expert by means of the affidavit required under § 9-11-9.1. (O.C.G.A. § 24-9-67.1(e)).

Clearly the legislature intended that this definition of expertise would apply to affidavits filed in support of a malpractice complaint pursuant to O.C.G.A. § 9-11-9.1.

Plaintiff has failed to meet this requirement. Nowhere does Plaintiffs' so called expert demonstrate that he would be deemed qualified under the provisions

of O.C.G.A. § 24-9-67.1. Nowhere is it specified that the individual was licensed to practice the same specialty as that of the Defendant, which is not a specialty in which surgery is performed. As appears from the affidavit of Defendants, their specialty of neonatology is a non-surgical specialty; they do no surgical procedures. There is nothing to establish that Plaintiffs' expert affidavit is given by an individual with knowledge of the standard of practice of neonatology in 2002.

It is the burden of the plaintiff to establish via an appropriate affidavit that the requisite knowledge and skill is in fact possessed by the affiant. The affidavit in question does not do so. Since the affidavit in question does not establish that Dr. Schwartz meets the requirement of O.C.G.A. § 24-9-67.1 as an expert, he cannot give a valid affidavit for purposes of O.C.G.A. § 9-11-9.1. Plaintiff's complaint must therefore be dismissed.

THE FAILURE TO FILE AN AUTHORIZATION AS REQUIRED BY O.C.G.A. 9-11-9.2 REQUIRES DISMISSAL

O.C.G.A. § 9-11-9.2 is part of the 2005 Georgia tort reform law, Senate Bill 3. In relevant parts it states that any medical malpractice action filed in Georgia shall have " . . . contemporaneously with the filing of the complaint, the plaintiff shall be required to file a medical authorization form. Failure to provide this authorization shall subject the complaint to

dismissal." No authorization was filed with the Complaint. Accordingly, under the clear reading of the statute, the within matter is subject to dismissal.

II. CONCLUSION

Given the Plaintiffs' failure to comply with the applicable law in at least two significant areas, Defendants urge that the Court dismiss Plaintiffs' Complaint against them.

Respectfully submitted this 18 day of April, 2006.

WEINBERG, WHEELER,
HUDGINS, GUNN &
DIAL, LLC

/s/ Robert G. Tanner
ROBERT G. TANNER
State Bar No. 697650
Attorney for Defendant

950 E. Paces Ferry Road
Suite 3000
Atlanta, Georgia 30326
(404) 876-2700

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing pleading on opposing counsel by mailing a copy of same in the U.S. Mail properly stamped and addressed to:

Frank J. Klosik, Jr., Esq.
Alina A. Krivitsky, Esq.
Greer, Klosik, Daugherty, Swank & McCune
4651-A Roswell Road
Atlanta, Georgia 30342

This 18 day of April, 2006.

WEINBERG, WHEELER,
HUDGINS, GUNN &
DIAL, LLC

/s/ Robert G. Tanner
ROBERT G. TANNER
State Bar No. 697650
Attorney for Defendant

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IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

TIMOTHY AND ANDREA SPACHT, INDIVIDUALLY AND AS NEXT FRIEND OF N. S., A MINOR, Plaintiffs, v. CHILDREN'S HEALTHCARE OF ATLANTA, INC., DR. WENDY A. TROYER, DR. WILLIAM G. KEYES, DR. JAMES THOMSEN, DR. VERLIA GOWER, DR. THEODORE BRAND AND DR. JOHN BLEACHER, Defendant.	)	CIVIL ACTION FILE NO. 06CV4104-4

AFFIDAVIT OF WILLIAM G. KEYES, M.D.

STATE OF GEORGIA

COUNTY OF DEKALB:

PERSONALLY APPEARING BEFORE ME, the undersigned attesting officer duly authorized to administer oaths, William G. Keyes, M.D., who, upon oath, deposes and says as follows:

1.

My name is William G. Keyes, M.D. I am an adult, more than 21 years of age, and suffering under

no disability. As such, I am competent to testify to the facts recited herein.

2.

Following graduation from the University of Tennessee Medical School, I took a residency training in pediatrics at Johns Hopkins Hospital, and fellowship training in neonatology at the same institution. Thereafter, I performed fellowship training in Pediatric Critical Care Medicine at the Children's National Medical Center in Washington, D.C. I am board certified in neonatology-perinatalogy medicine, pediatrics and pediatric critical care medicine.

3.

In 2001 and at the present time as well I specialized in the practice of pediatric critical care medicine and neonatology.

4.

The nature of my practice and my specialty is non-surgical. I do not perform and have not performed surgery.

5.

The care which I administer to patients in the practice of neonatology does not include surgical procedures, and I do not and am not qualified to

make decisions as to whether a patient should be taken to surgery or when, or under what circumstances surgery is properly performed.

6.

In my opinion, there is no meaningful overlap between the specialty of a pediatric surgeon and a neonatologist. Surgeons do not routinely attend the same continuing medical education as I would attend, and surgeons routinely address other aspects and issues of the practice of medicine than do physicians in my specialty. Surgeons have completely separate residency and training programs. They are credentialed separately by hospitals and typically have separate privileges at hospitals They are credentialed under separate boards.

7.

The within and foregoing statements are made upon my own personal knowledge and are true and correct.

8.

FURTHER AFFIANT SAYETH NOT.

This 18th day of APRIL, 2006.

/s/ William G. Keyes, M.D.
WILLIAM G. KEYES, M.D.

Sworn to and subscribed before me
this 18th day of April, 2006.

/s/ Susan M. Edelman [SEAL]
Notary Public
My commission expires: February 26, 2008

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

TIMOTHY AND ANDREA SPACHT, INDIVIDUALLY AND AS NEXT FRIEND OF N. S., A MINOR, Plaintiffs, v. CHILDREN'S HEALTHCARE OF ATLANTA, INC., DR. WENDY A. TROYER, DR. WILLIAM G. KEYES, DR. JAMES THOMSEN, DR. VERLIA GOWER, DR. THEODORE BRAND AND DR. JOHN BLEACHER, Defendant.	)	CIVIL ACTION FILE NO. 06CV4104-4

AFFIDAVIT OF WENDY A. TROYER, M.D.

STATE OF GEORGIA

COUNTY OF DEKALB:

PERSONALLY APPEARING BEFORE ME, the undersigned attesting officer duly authorized to administer oaths, Wendy A. Troyer, M.D., who, upon oath, deposes and says as follows:

1.

My name is Wendy A. Troyer, M.D. I am an adult, more than 21 years of age, and suffering under no

disability. As such, I am competent to testify to the facts recited herein.

2.

Following graduation from the Medical School at Indiana University, I took residency training in pediatrics at Children's Medical Center, Dayton, Ohio and fellowship training in neonatology at James Whitcomb Riley Hospital for Children, Indiana University. I am board certified in neonatology-perinatal medicine.

3.

In 2001 and at the present time as well I specialized in the practice of neonatology.

4.

The nature of my practice and my specialty is non-surgical. I do not perform and have not performed surgery.

5.

That care which I administered to patients in the context of a neonatology practice does not include surgical procedures, and I do not and am not qualified to make decisions as to whether a patient should be taken to surgery or when or under what circumstances surgery is properly performed.

6.

In my opinion, there is no meaningful overlap between the specialty of a pediatric surgeon and a neonatologist. Surgeons do not routinely attend the same continuing medical education as I would attend and routinely address other aspects and issues of the practice of medicine in my specialty.

7.

The within and foregoing statements are made upon my own personal knowledge and are true and correct.

8.

FURTHER AFFIANT SAYETH NOT.

This 18th day of APRIL, 2006.

/s/ W. Troyer
WENDY A. TROYER, M.D.

Sworn to and subscribed before me
this 18th day of April, 2006.

/s/ Susan M. Edelman [SEAL]
Notary Public
My commission expires: February 26, 2008

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing pleading on opposing counsel by mailing a copy of same in the U.S. Mail properly stamped and addressed to:

Frank J. Klosik, Jr., Esq.
Alina A. Krivitsky, Esq.
Greer, Klosik, Daugherty, Swank & McCune
4651-A Roswell Road
Atlanta, Georgia 30342

This 18 day of April, 2006.

/s/ Robert G. Tanner
Robert G. Tanner
State Bar No. 697650

950 E. Paces Ferry Road
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Atlanta, GA 30326
(404) 876-2700

IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

TIMOTHY AND ANDREA SPACHT, INDIVIDUALLY AND AS NEXT FRIEND OF N.S., A MINOR, Plaintiff, v. CHILDREN'S HEALTHCARE OF ATLANTA, INC., DR. WENDY A. TROYER, DR. WILLIAM G. KEYES, DR. JAMES THOMSEN, DR. VERLIA GOWER, DR. THEODORE BRAND AND DR. JOHN BLEACHER, Defendant.	)	Civil Action No: 06CV4104-4

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS WENDY TROYER AND WILLIAM KEYES' MOTION TO DISMISS

COMES NOW, Timothy and Andrea Spacht, individually and as next friend of N.S., a minor and files this their Response in Opposition to Defendants Wendy Troyer and William Keyes' Motion to Dismiss and shows this Honorable Court as follows:

I. INTRODUCTION

The facts of this case are deceptively simple. Dr. Troyer and Dr. Keyes are Neonatologists. Neonatology is the branch of pediatric medicine concerned with the *diagnosis* and *treatment* of newborns. According to the American Academy of Pediatrics, Neonatologists diagnose newborns with congenital birth defects and coordinate care and medically manage newborns in need of surgery.

On March 12, 2002, Dr. Troyer and Dr. Keyes ordered a CT scan for N.S. The results of the CT scan definitively established that N. suffered from a congenital birth defect known as a vascular ring. Surgical division of a vascular ring is indicated in all symptomatic patients. As Neonatologists, Wendy Troyer and William Keyes should have diagnosed N. with a vascular ring and promptly scheduled surgery for division of the ring. However, Dr. Troyer and Dr. Keyes ignored the CT scan results. The diagnosis was missed and surgical division was not scheduled.

Plaintiffs filed a complaint for medical malpractice against Dr. Troyer and Dr. Keyes based upon their failure to read and act upon the results of the CT scan. Accompanying their Complaint, in accordance with OCGA 9-11-9.1, was the affidavit of Plaintiff's expert, Dr. David Schwartz. See Complaint, Exhibit A. Dr. David Schwartz is a board certified Pediatric Surgeon and Fellow of the American College of Surgeons and American Academy of Pediatrics with over 30 years of experience and knowledge

gained from private practice as a pediatric surgeon and as a professor teaching pediatric surgery at Albert Einstein College of Medicine and New York University Medical Center. See Curriculum Vitae attached as Exhibit "A".

Based upon his knowledge and experience in pediatric medicine, Dr. Schwartz testified that N. suffered many acute and chronic complications because of the failure of Wendy Troyer and William Keyes to make a diagnosis of a vascular ring and their failure to promptly schedule surgical division of the vascular ring on March 12, 2002, when the definitive CT scan results were in hand.

Dr. Troyer and Dr. Keyes do not contest the fact that Dr. Schwartz is an expert in the diagnosis and surgical treatment of vascular rings. Their sole argument is that Dr. Schwartz is not competent to render this opinion under newly amended 24-9-67.1 because he is not a Neonatologist. Defendants' argument is absurd considering that Dr. Schwartz cannot be both an expert in the diagnosis and surgical treatment of neonatal patients with vascular rings and incompetent to testify as an expert on the diagnosis and surgical treatment of neonatal patients with vascular rings simply because he is not a Neonatologist.

Because Dr. Schwartz has experience and knowledge in the area of pediatric medicine dealing with the diagnosis and surgical treatment of newborns, and his opinion is limited to his expertise, he is

competent to give expert testimony, and Defendants' Motion to Dismiss must be denied.

As to Defendants' claim under OCGA 9-11-9.2, it is no longer at issue because the Plaintiffs filed an Amended Complaint with an Authorization.

II. Dr. Schwartz's Testimony More Than Satisfies The Requirements Of O.C.G.A. 24-9-67.1

OCGA 24-9-67.1 governs the admissibility of expert opinions. OCGA 24-9-67.1 states that the expert must have had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in

(A) The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; or

(B) The teaching of his or her profession for at least three of the last five years as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in teaching others

how to perform the procedure, diagnose the condition, or render the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue.

Qualifications

Dr. Schwartz is a board certified Pediatric Surgeon. Pediatric Surgery is defined by the American Board of Surgery Pediatric Surgery Qualification as the diagnostic, preoperative, operative and postoperative surgical management of congenital abnormalities and diseases in the neonatal and pediatric age groups. Thus, Dr. Schwartz is qualified to diagnose and manage by surgical treatment congenital abnormalities in newborns, and based upon over 30 years of experience in private practice as a pediatric surgeon and teaching his profession to medical students, is qualified to render an opinion on the failure to diagnose and schedule surgery for congenital abnormalities.

Dr. Schwartz received his medical school training and degree at Albert Einstein School of Medicine. He performed his internship and surgical residency at Bronx Municipal Hospital Center. He performed his pediatric surgery residency and fellowship at John [sic] Hopkins Hospital. Dr. Schwartz is board certified in pediatric surgery. He has been an assistant clinical professor in surgery at Albert Einstein College of Medicine for over 30 years. He has been a clinical assistant professor at New York University Medical

Center for twenty eight years. He has also been in private practice for pediatric surgery, B.S.K. Pediatric Surgical Associates, P.C. for over thirty years. See Plaintiffs' Complaint Exhibit A, CV attached hereto as Exhibit "A".

Based upon his knowledge and experience in diagnosing birth defects and treating by surgical division conditions affecting pediatric patients, he opined that N. suffered many acute and chronic complications because of the failure of Wendy Troyer and William Keyes to make a correct diagnosis of a vascular ring and promptly schedule surgical division of the ring. Id.

Considering the nature of Dr. Schwartz's work experience as a board certified pediatric surgeon and the teaching of his profession to medical students, he is certainly qualified to render this opinion and the jury is entitled to hear his opinion.

Although Defendants attempt to hide behind the title "Neonatologist" to disqualify plaintiffs' expert, it is the scope of the witness' knowledge and not the artificial classification by title that governs the threshold question of his qualifications. In fact, under long held Georgia law, a physician testifying as an expert witness on the standard of care exercised by another physician is not required to be a specialist in the area of medicine practiced by another physician. *Beatty v. Morgan*, 170 Ga.App. 661, 317 S.E.2d 662 (1984). Construing the statute according to its terms demonstrates that Dr. Schwartz is a competent

witness because his testimony falls within the scope of his practice as a Pediatric Surgeon. Namely, diagnosing newborns with congenital birth defects and treating by surgical repair.

Defendants' argument presumes that the diagnosis and management of a newborn with airway obstruction is exclusively within the professional skills of a Neonatologist and only a Neonatologist would be competent to give an opinion in this field. However, it has been consistently held that members of medical professions are competent to render an opinion about the standard of care of other members of the medical profession as long as their opinion concerns a common area of expertise. *Tye v. Wilson*, 208 Ga.App. 253, 430 S.E.2d 129 (1993).

Acting upon definitive imaging results establishing a vascular ring by making a diagnosis of a vascular ring and scheduling surgery is not exclusively limited to the professional skills of a Neonatologist and there is no evidence that it is so limited. In fact, N. was finally diagnosed with a vascular ring by Dr. Kanter, a pediatric cardio-thoracic surgeon who found the "old CT scan" and then performed surgical division of the vascular ring.

The affidavits of Dr. Keyes and Dr. Troyer are nothing more than thinly veiled attempts to dodge the real issue. The basis of the Plaintiffs' Complaint against them is the failure to diagnose a vascular ring despite having definitive imaging results in hand and the failure to schedule surgery for the vascular

ring when surgical division is indicated in all symptomatic patients. Dr. Schwartz is certainly an expert on the diagnosis and surgical division of vascular rings and is qualified to render an opinion on this issue. Had Defendants read the CT scan, a diagnosis of a vascular ring would have been made and a surgeon such as Dr. Schwartz would have been consulted. The fact that Defendants are not surgeons is not an excuse for their incompetence in failing to diagnose a vascular ring and consult with a surgeon.

In this regard, Defendants provide wholly inconsistent arguments. On one hand, they attempt to absolve themselves of liability by claiming that their practice is non surgical and they are not qualified to make decisions regarding when a patient should be taken in for surgery. Defendants distance themselves from the vascular ring by casting the vascular ring as a surgical problem outside of their area of expertise. On the other hand, the defendants claim that Dr. Schwartz is incompetent to testify as a medical expert because he is a Pediatric Surgeon and not a Neonatologist. Therefore, according to the defendants, the vascular ring is a surgical problem for liability purposes and a Neonatology problem for competency purposes. The subboard of Neonatal Perinatal Medicine examination which defines the knowledge a Neonatologist must demonstrate has been summarized by the certifying board. Specifically, the board states that a Neonatologist must know the clinical features of airway obstruction such as a vascular ring and plan appropriate management. See Subboard of

Neonatal Perinatal Subspecialty Outline attached as Exhibit "B". Clearly, these fields of medicine overlap and a diagnosis of a vascular ring based on definitive CT scan results is the same whether made by a Neonatologist or a Pediatric Surgeon.

The fact is a vascular ring is a congenital birth anomaly that encircles the trachea and esophagus causing breathing problems and digestive difficulties. It is a medical condition that many different specialists must recognize and treat or must recognize and refer for treatment. It is indeed a Neonatology problem and a surgical problem. Dr. Keyes and Dr. Troyer should have recognized the vascular ring and promptly consulted with a Pediatric Surgeon regarding surgical division. As a pediatric surgeon, with knowledge and experience in the diagnosis and treatment of vascular rings in neonatal children, Dr. Schwartz is competent to testify as to the defendants' failure to diagnose and consult with a pediatric surgeon such as himself regarding division of the ring. Complaint Exhibit A.

The Defendants have tapped into the bottom line. There is significant overlap between Neonatology and Pediatric Surgery so as to render Dr. Schwartz competent to testify against Dr. Keyes and Dr. Troyer.

III. Conclusion

Based on the facts and authorities cited above, Plaintiffs respectfully urge the Court to deny Defendants' Motion. The testimony of Dr. Schwartz more than satisfies the requirements of O.C.G.A. 24-9-67.1.

THIS 18th day of May, 2006.

GREER, KLOSIK, DAUGHERTY, SWANK AND MCCUNE

BY: /s/ Alina Krivitsky
FRANK J. KLOSIK, JR.
State Bar No.: 425300
ALINA KRIVITSKY
State Bar No.: 142056
Attorneys for Plaintiffs

4651-A Roswell Road
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EXHIBIT B

American Board of Pediatrics

Subspecialty Certifying Examination

CONTENT OUTLINE

Subboard of

Neonatal-Perinatal Medicine

pulmonary hypertension

Recognize the laboratory, imaging, and other diagnostic features of persistent pulmonary hypertension

Know the management of persistent pulmonary hypertension including assisted ventilation, pharmacologic approaches, and ECMO

D. Other causes of respiratory distress

1. Extrapulmonary (eg, diaphragmatic hernia, cord transection, etc.)

Plan appropriate therapy for an infant with extrapulmonary causes of respiratory distress

Recognize the clinical features of extrapulmonary causes of respiratory distress

Recognize the imaging features of extrapulmonary causes of respiratory distress

2. Airway obstruction (eg, vascular rings, choanal atresia, etc.)

Know the clinical features of an infant with airway obstruction

Plan appropriate management for an infant with airway obstruction

3. Miscellaneous

Recognize the clinical and imaging features of congenital malformations of the lung, including congenital pulmonary lymphangiectasia, the cystic lung diseases, such as congenital lobar emphysema, cystic adenomatoid malformation, and mediastinal tumors

Know the appropriate management for an infant with congenital malformations of the lung, including congenital pulmonary lymphantgiectasia, and the cystic lung diseases, such as congenital lobar emphysema, cystic adenomatoid malformation, and mediastinal tumors

4. Pleural disorders (effusion, chylothorax)

Know the pathophysiology and recognize the clinical, radiographic, and laboratory manifestations of hydrothorax/chylothorax

Plan the therapeutic management of hydrothorax/chylothorax

E. Apnea of prematurity and neonatal respiratory depression

Know the pathophysiology of apnea of prematurity

Know the management of apnea of prematurity

F. Treatment

CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the within and foregoing pleading by depositing in the United States Mail, properly addressed and with sufficient postage affixed thereto to ensure delivery to the following:

Mr. Robert G. Tanner
Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC
950 East Paces Ferry Road
Suite 3
Atlanta, GA 30326

Thomas E. Lavender, III
The Weathington Firm
230 Peachtree Street
Suite 2700
Atlanta, GA 30303

Darcy Coty
Greenberg Traurig LLP
The Forum – Suite 400
3290 Northside Parkway
Atlanta, Georgia 30327

H. Andrew Owen
OWEN GLEATON EGAN JONES &
SWEENEY, LLP
1230 Peachtree St., N.E.
Suite 1400, Promenade Two
Atlanta, GA 30309-3574

This 18 day of May, 2006.

GREER, KLOSIK, DAUGHERTY,
SWANK AND MCCUNE

BY: /s/ Alina Krivitsky
ALINA KRIVITSKY
State Bar No.: 142056
Attorney for Plaintiffs

4651-A Roswell Road
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IN THE SUPERIOR COURT OF DEKALB COUNTY STATE OF GEORGIA

TIMOTHY AND ANDREA SPACHT, INDIVIDUALLY AND AS NEXT FRIEND OF N.S., A MINOR	)	**CIVIL ACTION NO. 06-CV-04104-4**
Plaintiffs,	)	
v.	)	
CHILDREN'S HEALTH-CARE OF ATLANTA, INC., DR. WENDY A. TROYER, DR. WILLIAM G. KEYES, DR. JAMES THOMSEN, DR. VERLIA GOWER, DR. THEODORE BRAND, AND DR. JOHN BLEACHER,	)	
Defendants.	)	

DEFENDANTS DR. JAMES THOMSEN AND DR. VERLIA GOWER'S MOTION TO DISMISS

COME NOW Defendants James Thomsen, M.D. and Verlia Gower, M.D. (collectively "Defendants") and, pursuant to O.C.G.A §§ 9-11-9.1, 9-11-9.2, 9-11-12(b)(6) and 24-9-67.1, hereby move this Court to dismiss Plaintiffs' Complaint against Defendants based on Plaintiffs' failure to attach the affidavit of a qualified expert to their Complaint in accordance with O.C.G.A. § 9-11-9.1 and failure to file a medical authorization as prescribed by O.C.G.A. § 9-11-9.2.

In support of their Motion, Defendants rely upon Plaintiffs' Complaint, the Affidavit of David Schwartz, M.D. attached to Plaintiffs' Complaint and Defendants' Brief in Support of this Motion to Dismiss.

Wherefore, Defendants respectfully request that this Court grant this Motion and dismiss Plaintiffs' Complaint with prejudice.

Respectfully submitted this 15th day of May, 2006.

GREENBERG TRAURIG, LLP

/s/ Darcy Coty
Lori G. Cohen
Georgia Bar No. 174455
Darcy Coty
Georgia Bar No. 259280
Attorneys for Defendants James Thomsen, M.D. and Verlia Gower, M.D.

The Forum – Suite 400
3290 Northside Parkway
Atlanta, GA 30327
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IN THE SUPERIOR COURT OF DEKALB COUNTY STATE OF GEORGIA

TIMOTHY AND ANDREA SPACHT, INDIVIDUALLY AND AS NEXT FRIEND OF N.S., A MINOR	)	**CIVIL ACTION NO. 06-CV-04104-4**
Plaintiffs,	)	
v.	)	
CHILDREN'S HEALTH-CARE OF ATLANTA, INC., DR. WENDY A. TROYER, DR. WILLIAM G. KEYES, DR. JAMES THOMSEN, DR. VERLIA GOWER, DR. THEODORE BRAND, AND DR. JOHN BLEACHER,	)	
Defendants.	)	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing DEFENDANTS DR. JAMES THOMSEN AND DR. VERLIA GOWER'S MOTION TO DISMISS upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, properly addressed to the following:

Robert Tanner
Weinberg Wheeler
Hudgins Gunn &
Dial, LLC
950 East Paces Ferry
Road, Ste 3000
Atlanta, Georgia 30326

Thomas Lavender
The Weathington
Firm, P.C.
230 Peachtree Street NW,
Suite 2700
Atlanta, Georgia 30303

Frank Klosik, Jr.
Alina Krivitsky
GREER, KLOSIK, DAUGHTERY,
SWANK AND CUNE [sic]
4651-A Roswell Road
Atlanta, Georgia 30342

This 15th day of May, 2006.

By: /s/ Darcy Coty
Darcy Coty

IN THE SUPERIOR COURT OF DEKALB COUNTY STATE OF GEORGIA

TIMOTHY AND ANDREA SPACHT, INDIVIDUALLY AND AS NEXT FRIEND OF N.S., A MINOR	)	**CIVIL ACTION NO. 06-CV-04104-4**
Plaintiffs,	)	
v.	)	
CHILDREN'S HEALTH-CARE OF ATLANTA, INC., DR. WENDY A. TROYER, DR. WILLIAM G. KEYES, DR. JAMES THOMSEN, DR. VERLIA GOWER, DR. THEODORE BRAND, AND DR. JOHN BLEACHER,	)	
Defendants.	)	

DEFENDANTS DR. JAMES THOMSEN AND DR. VERLIA GOWER'S BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

COME NOW Defendants James Thomsen, M.D. ("Dr. Thomsen") and Verlia Gower, M.D. ("Dr. Gower") (collectively "Defendants") and, pursuant to O.C.G.A §§ 9-11-9.1, 9-11-9.2, 9-11-12(b)(6) and 24-9-67.1, hereby file this Brief in Support of Their Motion to Dismiss, contemporaneously with their Answer and Defenses to Plaintiffs' Complaint. Plaintiffs' Complaint against Defendants should be dismissed in its

entirety because the Affidavit of David L. Schwartz ("Dr. Schwartz") is insufficient pursuant to O.C.G.A. § 9-11-9.1 because, on its face, Dr. Schwarz's Affidavit fails to establish that Dr. Schwartz is qualified or competent to testify regarding the relevant standard of care owed by a pediatric otolaryngologist. Additionally, Plaintiffs' Complaint should [sic] dismissed in its entirety because Plaintiffs failed to file a medical authorization as prescribed by O.C.G.A. § 9-11-9.2.

In support of their Motion to Dismiss, Defendants shows the Court as follows:

STATEMENT OF FACTS

Plaintiffs filed their Complaint in this medical malpractice action on March 24, 2006, alleging, among other things, that Defendants were negligent in the medical care they provided to Plaintiffs' son, N.S. ("N"). More specifically, Plaintiffs allege that Dr. Thomsen "failed to read or act upon the results of the CAT scan which established that N. suffered from a vascular ring, and kept in place an unnecessary tracheotomy, referring to N. as tracheotomy dependent" (Compl. ¶ 17.) Plaintiffs further allege that Dr. Gower performed a "major" and unnecessary submandibular gland excision and parotid duct ligation. *Id.* at ¶ 22. Defendants dispute Plaintiffs' allegations and affirmatively assert that they at all times met or exceeded the relevant standard of care in rendering medical care and treatment to N. *See generally* Defendants Dr. James Thomsen and Dr. Verlia

Gower's Answer and Defenses To Plaintiffs' Complaint.

In conjunction with their Complaint, Plaintiffs filed the Affidavit of Dr. Schwartz, a purported expert.[1] In his Affidavit, Dr. Schwartz states that "[t]he establishment of a surgical traecheostomy would have been avoided if Dr. Thomsen" had recognized the existence of a certain medical condition. (Schwartz Aff. ¶ 2(C).) Dr. Schwartz did not attach a curriculum vitae to his affidavit. Instead, Dr. Schwartz's Affidavit itself provides an abbreviated educational and professional history. (*See* Schwartz Aff. ¶ 4.)

As a matter of law, Dr. Schwartz's Affidavit demonstrates that he is not competent or qualified to render expert testimony against Defendants. Where as Dr. Thomsen is a pediatric otolaryngologist who completed residencies in general surgery and otolaryngology and a fellowship in pediatric otolaryngology, Dr. Schwartz is a general pediatric surgeon. *Id.* Similarly, whereas Dr. Schwartz was trained as and practices as a general pediatric surgeon, Dr. Gower completed a residency in otorhinolaryngology and a fellowship in pediatric otorhinolaryngology.

As pediatric otolaryngologists, Defendants have undergone extremely specialized training in and

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[1] For the court's convenience, a copy of Dr. Schwartz's affidavit is attached hereto as *Exhibit A* (hereinafter, Schwartz Aff.).

routinely provide medical care to patients with difficult airways and critical larynxes. In contrast, Dr. Schwartz's Affidavit does not reflect any experience in the dedicated field of pediatric otolaryngology, whether through private practice, board certification, teaching, or otherwise. *See generally id.* Accordingly, there is no indication whatsoever that Dr. Schwartz is qualified to assess or otherwise comment on the standard of care applicable to Dr. Defendants – board certified otolargyngologists. Because Dr. Schwartz is not qualified to testify against Defendants, the Court must dismiss Plaintiffs' claims against Defendants in their entirety.

Additionally, Plaintiffs did not file a medical authorization as required by O.C.G.A. § 9-11-9.2, and the Court should therefore dismiss Plaintiffs' Complaint.

ARGUMENT AND CITATION OF AUTHORITY

I. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED BECAUSE PLAINTIFFS' EXPERT AFFIDAVIT IS DEFECTIVE AS TO DEFENDANTS

The Court should dismiss Plaintiffs' Complaint in its entirety because the Affidavit of Dr. Schwartz filed contemporaneously with Plaintiffs' Complaint fails to comply with O.C.G.A. § 9-11-9.1. Section 9-11-9.1 requires that when a complaint for professional negligence is filed, it must be accompanied by the affidavit "of an expert competent to testify, which

affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim." O.C.G.A. § 9-11-9.1. A complaint that is not accompanied by a legally sufficient expert affidavit will be dismissed. *Id.* Where, as here, the plaintiff files the "defective" affidavit of an unqualified expert with the complaint and a defendant files a motion to dismiss on grounds that the affidavit is legally insufficient the court must dismiss the complaint unless the plaintiff amends and cures with a new affidavit within thirty (30) days of service of the defendant's motion to dismiss. O.C.G.A. § 9-11-9.1(b).

The Georgia legislature has provided detailed instructions regarding the requirements for expert witness competency in medical malpractice cases. *See* O.C.G.A. § 24-9-67.1. Of special relevance to the present case are the requirements that the "expert" be licensed to practice medicine at the time of the alleged events, and that he have "actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given." O.C.G.A. § 24-9-67.1(c)(2) (emphasis added). "Actual professional knowledge" is defined as having *actively* practiced in the area of specialty for "at least three of the last five years, *with sufficient frequency* to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue."

O.C.G.A. § 24-9-67.1(c)(2)(A). Alternatively, an affiant may gain "actual professional knowledge and experience in [a particular] area of practice or specialty" by having taught that practice area at accredited institution "for three of the last five years" with sufficient frequency to establish the appropriate level of knowledge." O.C.G.A. § 24-9-67.1(c)(2)(B). These standards apply both to testifying experts and to experts submitting an affidavit pursuant to O.C.G.A. § 9-11-9.1. O.C.G.A. § 24-9-67.1(e).

In the instant case, Plaintiffs have filed the Affidavit of Dr. Schwartz. In order for Dr. Schwartz's Affidavit to be sufficient for the purposes of the Georgia Civil Practice Act, Dr. Schwartz must have "actual professional knowledge" in rendering or teaching the specialized treatment or care at issue in this case – pediatric otolaryngology. Specifically then, Dr. Schwartz must have "actively practiced" as a full-time or almost full-time pediatric otolaryngologist or taught pediatric otolaryngology for at least three of the last five years, with "sufficient frequency to establish an appropriate level of knowledge." O.C.G.A. § 24-9-67.1(c)(2)(A), (B). Significantly, these standards apply both to testifying experts and to experts submitting an affidavit pursuant to O.C.G.A. § 9-11-9.1. O.C.G.A. § 24-9-67.1(e).

On the face of his Affidavit, there is no indication that Dr. Schwartz has *any* professional training or experience in pediatric otolaryngology. *See generally* Schwartz Aff. Instead, Dr. Schwartz's Affidavit recites only that he has practiced as a pediatric surgeon

since 1974 and that he has served as an assistant clinical professor of surgery since 1974. (Schwartz Aff. 4.) Unlike Defendants, Dr. Schwartz's Affidavit indicates that he has never practiced as a pediatric otolaryngologist, let alone done so for three of the past five years which is required by the statute, such that his Affidavit fails to establish sufficient professional knowledge to assess any procedure, treatment, or diagnosis rendered by Defendants, board certified otolaryngologists.

Pediatric otolaryngology is a highly specialized area of medicine that requires particular education, training, knowledge, and experience. Because Dr. Schwartz's Affidavit fails to establish that Dr. Schwartz has been actively engaged in teaching or practicing this specialty, Dr. Schwartz is not competent to testify to the standard of care applicable to pediatric otolaryngologists. Accordingly, the Affidavit of Dr. Schwartz does not comport with the requirement of O.C.G.A. § 9-11-9.1, and the Court must therefore dismiss Plaintiffs' claims against Defendants.

II. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED BECAUSE PLAINTIFF FAILED TO FILE A MEDICAL AUTHORIZATION AS REQUIRED BY O.C.G.A. § 9-11-9.2

Plaintiffs' Complaint should be dismissed in its entirety because Plaintiffs failed to file the required medical authorization in accordance with O.C.G.A. § 9-11-9.2. In pertinent part, O.C.G.A. § 9-11-9.2 states that in any action for damages alleging medical malpractice against a doctor or hospital, "contemporaneously with the filing of the Complaint, the plaintiff shall be required to file a medical authorization form. Failure to file this authorization shall subject the complaint to dismissal."

In the instant case, Plaintiffs have failed to file a medical authorization in accordance with O.C.G.A, § 9-11-9.2, and their Complaint should, therefore, be dismissed.

CONCLUSION

Plaintiffs have failed to comply with the requirements of O.C.G.A. § 9-11-9.1 and 9-11-9.2, and Defendants respectfully request that the Court dismiss Plaintiffs' claims against them for the reasons set forth more fully above.

Respectfully submitted this 15th day of May, 2006.

GREENBERG TRAURIG, LLP

/s/ Darcy Coty

Lori G. Cohen
Georgia Bar No. 174455
Darcy Coty
Georgia Bar No. 259280
Attorneys for Defendants James Thomsen, M.D. and Verlia Gower, M.D.

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IN THE SUPERIOR COURT OF DEKALB COUNTY STATE OF GEORGIA

TIMOTHY AND ANDREA SPACHT, INDIVIDUALLY AND AS NEXT FRIEND OF N.S., A MINOR	)	**CIVIL ACTION NO. 06-CV-04104-4**
Plaintiffs,	)	
v.	)	
CHILDREN'S HEALTH-CARE OF ATLANTA, INC., DR. WENDY A. TROYER, DR. WILLIAM G. KEYES, DR. JAMES THOMSEN, DR. VERLIA GOWER, DR. THEODORE BRAND, AND DR. JOHN BLEACHER,	)	
Defendants.	)	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing DEFENDANTS DR. JAMES THOMSEN AND DR. VERLIA GOWER'S BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, properly addressed to the following:

Robert Tanner
Weinberg Wheeler
Hudgins Gunn &
Dial, LLC
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Road, Ste 3000
Atlanta, Georgia 30326

Thomas Lavender
The Weathington
Firm, P.C.
230 Peachtree Street NW,
Suite 2700
Atlanta, Georgia 30303

Frank Klosik, Jr.
Alina Krivitsky
GREER, KLOSIK, DAUGHTERY,
SWANK AND CUNE [sic]
4651-A Roswell Road
Atlanta, Georgia 30342

This 15th day of May, 2006.

By: /s/ Darcy Coty
Darcy Coty

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

TIMOTHY AND ANDREA SPACHT, INDIVIDUALLY AND AS NEXT FRIEND OF N. S., A MINOR, Plaintiff,	)	
v.	)	
CHILDREN'S HEALTHCARE OF ATLANTA, INC., DR. WENDY A. TROYER, DR. WILLIAM G. KEYES, DR. JAMES THOMSEN, DR. VERLIA GOWER, DR. THEODORE BRAND AND DR. JOHN BLEACHER, Defendant.	)	Civil Action No: 06CV4104-4

PLAINTIFFS BRIEF IN SUPPORT OF THEIR RESPONSE IN OPPOSITION TO DEFENDANTS DR. JAMES THOMSEN AND DR. VERLIA GOWER'S MOTION TO DISMISS

COMES NOW, Timothy and Andrea Spacht, individually and as next friend of N. S., a minor and files this their Brief in Support of Response in Opposition to Defendants James Thomsen and Verlia Gower's Motion to Dismiss and shows this Honorable Court as follows:

I. INTRODUCTION

Plaintiffs filed the instant action on March 24, 2006. Accompanying their Complaint, in accordance with the provisions of OCGA § 9-11-9.1, was the affidavit of Plaintiff's expert, Dr. David Schwartz. See Complaint, Affidavit attached hereto as Exhibit A. Dr. Schwartz's affidavit shows that he can opine as to whether malpractice existed. He testified that he is a Board Certified Pediatric Surgeon and Fellow of the American College of Surgeons and American Academy of Pediatrics; that he has practiced pediatric surgery for 32 years; and that he has been a clinical assistant professor at Albert Einstein College of Medicine and New York University Medical Center for 28 years. See also Curriculum Vitae attached as Exhibit "B."

Based upon his knowledge and experience as a pediatric surgeon, and his review of certified medical records from Children's Healthcare of Atlanta concerning the treatment of N. S., Dr. Schwartz testified that Dr. Thomsen and Dr. Gower failed to recognize that N. S. suffered from a vascular ring. He states that the establishment of a surgical tracheotomy would have been avoided if Dr. Thomsen recognized that N.s' presentation was a consequence of his vascular ring.

He states that if Dr. Gower had reviewed the history, and all radiology reports prior to performing the bilateral mandibular gland excision and bilateral parotid duct ligations, including review of the March

12, 2002 CT scan report establishing that N. suffered from a vascular ring, she could have seen that N. had a vascular ring, and she could have avoided this procedure and all of the negative side effects that are associated with this procedure.

Dr. Schwartz does not testify to the manner in which the tracheotomy was established or the salivary glands removed. He states that these procedures were unnecessary and would have been avoided if Defendants recognized that N. had a vascular ring. With over 30 years of experience in private practice and as a professor, Dr. Schwartz is certainly qualified to recognize the presentation of a vascular ring and all of the symptoms associated with a vascular ring; he is qualified to perform a surgical division of the vascular ring, and he is certainly competent to testify that the failure to recognize a vascular ring is a violation of professional standards.

That Dr. Schwartz is competent to testify to the standard of care applicable to pediatric patients presenting with a vascular ring is not challenged by Defendants. Their sole argument is that Dr. Schwartz is not competent to render an opinion against Dr. Gower and Dr. Thomsen because he is not a Pediatric Otolaryngologist. According to the Defendants, a plaintiff alleging malpractice against a Pediatric Otolaryngologist can only meet the requirements of OCGA 9-11-9.1 by submitting the affidavit of a Pediatric Otolaryngologist, no matter what acts of negligence are alleged. This is simply not the law. The law states that members of the medical profession are

competent to render an opinion about the standard of care of other members of the medical profession as long as their opinion concerns a common area of expertise.

As pertinent here, recognizing that a patient's presentation is the result of a vascular ring and reviewing a patient's history are not matters exclusively within the professional skills of a Pediatric Otolaryngologist. Dr. Schwartz's expertise as a Pediatric Surgeon encompasses the standard of care applicable to the performance of these matters because he is qualified to diagnose and treat a vascular ring, and is certainly competent to testify that reviewing a patient's history is a duty owed a patient, and the failure to so is the result of a breach of that duty.

Furthermore, Defendants' claims under OCGA § 9-11-9.2 are no longer an issue because the Plaintiffs amended their Complaint to file a medical authorization as prescribed by OCGA § 9-11-9.2.

Consequently, the Defendants' Motion to Dismiss must be denied because the Plaintiffs' expert, Dr. Schwartz is competent and qualified to render expert testimony as to the acts and omissions of these Defendants, and Plaintiffs filed a medical authorization as prescribed by OCGA § 9-11-9.2.

II. ARGUMENT AND CITATION OF AUTHORITY

The purpose of OCGA § 9-11-9.1 is to reduce the number of frivolous malpractice suits being filed, not to require a plaintiff to prove a prima facie case entitling him to recover and capable of withstanding a motion for summary judgment before the defendant need file his answer. *Lee v. Visiting Nurse Heath System of Metropolitan Atlanta, Inc.*, 223 Ga.App. 305, 477 S.E.2d 445 (1996). For a complaint to be subject to dismissal for failure to state a claim, the affidavit must disclose with certainty that the plaintiff would not be entitled to relief under any state of provable facts. Id. A Section 9-11-9.1 affidavit should be construed most favorably to the plaintiff and all doubts resolved in plaintiff's favor, even if an unfavorable construction of the affidavit may be possible, so long as such construction does not detract from the purpose of § 9-11-9.1 of reducing the number of frivolous malpractice suits. Id. This rule is to be applied to questions of the affiant's competence. Id.

1. Dr. Schwartz's affidavit is sufficient under OCGA § 9-11-9.1 because his testimony concerns a common area of expertise

Dr. Schwartz's affidavit shows that he can opine whether malpractice existed. He testified that he has practiced pediatric surgery for over thirty years and has extensive experience in pediatric surgery; and that he makes his affidavit based upon his experience

in pediatric surgery, both in private practice and as a professor. Based upon his knowledge and experience in pediatric surgery, and his review of the certified medical records from Children's Healthcare of Atlanta, he testified that Dr. Gower should have reviewed the patient's history, including all radiology reports prior to performing the bilateral mandibular gland excision and bilateral parotid duct ligations. If she had reviewed the March 12, 2002 CAT scan report, she would have seen that N. suffered from a vascular ring and she could have avoided this procedure and all of the negative side effects that are associated with this procedure.

Dr. Schwartz further testified that the establishment of a surgical tracheotomy would have been avoided if Dr. Thomsen recognized that N.'s presentation was a consequence of his vascular ring.

Dr. Schwartz's testimony against these defendants is that (1) the failure to recognize that a patient's presentation is the result of a vascular ring is a violation of professional standards (2) the failure to review a patient's history is a violation of professional standards. Because Dr. Schwartz has knowledge and experience in recognizing that a patient's presentation is the result of a vascular ring and reviewing a patient's history, he is certainly qualified and competent to render this opinion. *Lee v. Visiting Nurse Health System of Metropolitan Atlanta, Inc.*, 223 Ga.App. 305, 477 S.E.2d 445 (1996).

When the subject matter to which the plaintiff's expert testifies is not a matter exclusively within the professional skills of the defendant, and there is no evidence that only the defendant is qualified to render the treatment at issue, it cannot be presumed that only a professional within the same specialty as the defendant would be competent to give an expert opinion or testimony in the area. *Tye v. Wilson*, 208 Ga.App. 253, 430 S.E.2d 129 (1993). The plaintiff's expert is a pediatric surgeon and presumably has the education, training, and experience normally possessed by a pediatric surgeon. There is nothing to suggest that a pediatric otolaryngologist has the expertise to recognize a vascular ring or review a patient's history, whereas a pediatric surgeon does not. As such, the plaintiff's expert is competent and qualified to render an opinion in this area. Id.

2. Dr. Schwartz's Testimony More Than Satisfies The Requirements Of O.C.G.A. 24-9-67.1

OCGA 24-9-67.1 governs the admissibility of expert opinions. OCGA 24-9-67.1 states that the expert must have had actual professional knowledge and experience *in the area of practice or specialty in which the opinion is to be given* as the result of having been regularly engaged in

(A) The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an

appropriate level of knowledge, as determined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; or

(B) The teaching of his or her profession for at least three of the last five years as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in teaching others how to perform the procedure, diagnose the condition, or render the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue.

Qualifications

Dr. Schwartz is a board certified Pediatric Surgeon. Pediatric Surgery is defined by the American Board of Surgery Pediatric Surgery Qualification as the diagnostic, preoperative, operative and postoperative surgical management of congenital abnormalities and diseases in the neonatal and pediatric age groups. Thus, Dr. Schwartz is qualified to diagnose and manage by surgical treatment congenital abnormalities in newborns, and based upon over 30 years of experience in private practice as a pediatric surgeon and teaching his profession to medical students, is qualified to render an opinion on the failure to diagnose such abnormality and the failure to review a

patient's history establishing that the patient suffers from said abnormality.

Dr. Schwartz received his medical school training and degree at Albert Einstein School of Medicine. He performed his internship and surgical residency at Bronx Municipal Hospital Center. He performed his pediatric surgery residency and fellowship at John Hopkins Hospital. Dr. Schwartz is board certified in pediatric surgery. He has been an assistant clinical professor in surgery at Albert Einstein College of Medicine for over 30 years. He has been a clinical assistant professor at New York University Medical Center for twenty eight years. He has also been in private practice for pediatric surgery, B.S.K. Pediatric Surgical Associates, P.C. for over thirty years. See CV.

Based upon his knowledge and experience in diagnosing birth defects and treating by surgical division conditions affecting pediatric patients, he opined that N. suffered many acute and chronic complications because of the failure of James Thomsen to make a correct diagnosis of a vascular ring and the failure of Verlia Gower to review the patient's history establishing that the patient had a vascular ring.

Considering the nature of Dr. Schwartz's work experience as a board certified pediatric surgeon and the teaching of his profession to medical students, he is certainly qualified to render this opinion and the jury is entitled to hear his opinion.

Although Defendants attempt to hide behind the title "Pediatric Otolaryngologist" to disqualify plaintiffs' expert, it is the scope of the witness' knowledge

and not the artificial classification by title that governs the threshold question of his qualifications. In fact, under long held Georgia law, a physician testifying as an expert witness on the standard of care exercised by another physician is not required to be a specialist in the area of medicine practiced by another physician. *Beatty v. Morgan*, 170 Ga.App. 661, 317 S.E.2d 662 (1984). Construing the statute according to its terms demonstrates that Dr. Schwartz is a competent witness because his testimony falls within the scope of his practice as a Pediatric Surgeon. Namely, recognizing the presentation of a vascular ring and reviewing the history establishing that the patient has a vascular ring.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that the Court deny Defendants' Motion to Dismiss for the reasons set forth more fully above.

THIS 26 day of June, 2006.

GREER, KLOSIK, DAUGHERTY, SWANK AND MCCUNE

BY: /s/ Alina Krivitsky
JOHN F. DAUGHERTY
State Bar No.: 205850
ALINA KRIVITSKY
State Bar No.: 142056
Attorneys for Plaintiffs

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(404) 252-2020

CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the within and foregoing pleading by depositing in the United States Mail, properly addressed and with sufficient postage affixed thereto to ensure delivery to the following:

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This 26 day of June, 2006.

GREER, KLOSIK, DAUGHERTY,
SWANK AND MCCUNE

BY: /s/ Alina Krivitsky
ALINA KRIVITSKY
State Bar No.: 142056
Attorneys for Plaintiffs

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IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

TIMOTHY AND ANDREA SPACHT, INDIVIDUALLY AND AS NEXT FRIEND OF N.S., A MINOR, Plaintiff, v. CHILDREN'S HEALTHCARE OF ATLANTA, INC., DR. WENDY A. TROYER, DR. WILLIAM G. KEYES, DR. JAMES THOMSEN, DR. VERLIA GOWER, DR. THEODORE BRAND, AND DR. JOHN BLEACHER, Defendant.	Civil Action No. 06-CV-04104-4

MOTION TO SUPPLEMENT AFFIDAVIT

COMES NOW TIMOTHY AND ANDREA SPACHT, INDIVIDUALLY AND AS NEXT FRIEND OF N.S., A MINOR, Plaintiffs in the above captioned case, and files this their Motion to Supplement Affidavit showing this Court as follows:

When an expert's affidavit is filed contemporaneously with the Complaint, a plaintiff is allowed to supplement the affidavit if its sufficiency is challenged. *Lennen v. Dept. of Transportation,* 239 Ga.App. 729, 521 S.E.2d 885 (1999). In this case, the sufficiency of

plaintiff's expert's affidavit has been challenged by Defendants Troyer, Keyes, Thomsen, and Gower. Defendants allege that plaintiff's expert, Dr. Schwartz is not competent to testify because he does not have the same specialty as the physicians he is testifying against. Specifically, Dr. Schwartz is a Board Certified Pediatric Cardiologist. Defendants Troyer and Keyes allege that he cannot testify against them because they are Neonatologists. Defendants Thomsen and Gower allege that he cannot testify as against them because they are Pediatric Otolaryngologists. The Defendants cite to O.C.G.A. § 24-9-67.1 claiming that the newly amended statute requires the expert to have the same specialty as the physician he testifies against.

This is simply not the law. In *Cotten v. Phillips*, 2006 WL 1843634 (Ga.App.), the Court of Appeals held that O.C.G.A. § 24-9-67.1 did not require an expert to have the same specialty as the physician he testified against. The Court found that the language of the statute providing that an expert witness testifying in a medical malpractice action must have "actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given" did not apply to preclude testimony of a medical expert whose specialty was different that [sic] the physician he testified against. *Id.* Instead, the Court concluded that an expert must have knowledge and experience in the area of practice or specialty about which he is providing testimony. The Court found that a medical doctor belonging to Specialty A

can render an opinion about the acts or omissions of another doctor belonging to Specialty B so long as the opinion of the expert witness belonging to Specialty A pertains to Specialty A.

In the instant case, Dr. Schwartz, a Board Certified Pediatric Surgeon, gives an opinion on the vascular ring issues involved herein. In his Supplemental Affidavit attached hereto as Exhibit "A," Dr. Schwartz testified that as a Board Certified Pediatric Surgeon, he has the training, knowledge, and experience to diagnose and surgically manage children with vascular rings, which is the medical condition at issue in this case. Dr. Schwartz further opined that based upon over 30 years of experience in diagnosing and surgically managing children with vascular rings, Dr. Troyer, Dr. Keyes, Dr. Gower and Dr. Thomsen failed to exercise that degree of skill and care ordinarily required by the medical profession in general under like conditions and similar circumstances. He identified the following specific acts or omissions in support of this opinion:

(1) The failure of Wendy Troyer and William Keyes to diagnose and refer N. to a surgeon for evaluation of his vascular ring based upon his March 12, 2002 CAT scan, which definitively established that N.S. suffered from a vascular ring, of which he had the most common type, a right aortic arch with aberrant left subclavian. Vascular rings are life threatening conditions which must be immediately diagnosed and evaluated. It is my

opinion that there is absolutely no reason why this should not have been done when symptomology was clear and definitive imaging results were in hand.

(2) Dr. Gower unnecessary performed a bilateral submandibular gland excision and bilateral parotid duct ligation that could have been avoided. Surgical division of the vascular ring would have fixed the root cause of the problem by alleviating the compression on his esophagus, thus allowing N. to swallow correctly. Dr. Gower should have reviewed the history, including all radiology reports prior to performing the bilateral mandibular gland excision and bilateral parotid duct ligations. If she had reviewed the March 12, 2002 CAT scan report, she would have seen that N. suffered from a vascular ring and she could have avoided this procedure and all of the negative side effects that are associated with this procedure.

(3) Dr. Thomsen kept in place an unnecessary tracheostomy. The establishment of a surgical tracheostomy would have been avoided if Dr. Thomsen recognized that N.'s presentation was a consequence of his vascular ring.

Dr. Schwartz further opined that in order to have treated and cared for N.S. properly under these conditions, the standard of care required of Dr.

Troyer, Dr. Keyes, Dr. Thomsen and Dr. Gower was as follows:

(1) The doctors should have promptly diagnosed N. with a vascular ring and immediately referred him to a surgeon for evaluation of his vascular ring for surgical division

(2) The doctors should have read and acted upon the definitive results of the CAT scan taken on March 12, 2002 which established that N. had a vascular ring

(3) The doctors should have diagnosed N. with a vascular ring and made the connection that N.'s airway problems were caused by the vascular ring. The establishment of a tracheostomy, numerous bronchoscopies and endoscopies and the bilateral mandibular gland excision and bilateral parotid duct ligations as well as the nissen fundoplication and g tube would have been avoided.

Clearly, the area of practice in which the opinion is to be given is pediatric surgery, which is Dr. Schwartz's specialty and Dr. Schwartz is qualified to give an opinion in this area.

WHEREFORE, Plaintiffs respectfully request that the Court deny Defendants' Motions to Dismiss.

THIS 18 day of September, 2006.

GREER, KLOSIK, DAUGHERTY,
SWANK AND MCCUNE

BY: /s/ John F. Daugherty
JOHN F. DAUGHERTY
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ALINA KRIVITSKY
State Bar No.: 142056
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CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the within and foregoing pleading by depositing in the United States Mail, properly addressed and with sufficient postage affixed thereto to ensure delivery to the following:

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H. Andrew Owen
OWEN GLEATON EGAN
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Suite 1400, Promenade Two
Atlanta, GA 30309-3574

This 18 day of Sept., 2006.

GREER, KLOSIK, DAUGHERTY,
SWANK AND MCCUNE

BY: /s/ Alina Krivitsky
ALINA KRIVITSKY
State Bar No.: 142056
Attorney for Plaintiffs

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PLAINTIFF'S EXHIBIT A

AFFIDAVIT OF DAVID L. SCHWARTZ, M.D., F.A.C.S., F.A.A.P.

STATE OF NEW YORK
COUNTY OF _____

BEFORE ME, the undersigned officer duly authorized to administer oaths, came David L. Schwartz MD., F.A.C.S., F.A.A.P., who after being duly sworn, states the following;

1.

My name is David L. Schwartz, and I make this supplemental affidavit based on my knowledge, training, and experience as a skilled board certified pediatric surgeon. As a Pediatric surgeon, I operate on children whose development ranges from the newborn stage through the teenage years. I am primarily concerned with the diagnosis, preoperative, operative, and postoperative management of surgical problems in children.

2.

As a board certified Pediatric Surgeon, I have the training, knowledge and experience to diagnose and surgically manage children with vascular rings, which is the medical condition at issue in this case. My knowledge and experience in diagnosing and surgically managing children with vascular rings was gained from my extensive medical training and

experience. I gained my medical school training and degree at Albert Einstein School of Medicine. I performed my internship and surgical residency 1964-1970 at Bronx Municipal Hospital Center. I performed my pediatric surgery residency and fellowship 1972-1974 at John Hopkins Hospital. I am board certified in pediatric surgery. I am an assistant clinical professor in surgery at Albert Einstein College of Medicine, 1974-present, I am a clinical assistant professor at New York University Medical Center, 1978-present, I am in private practice for pediatric surgery, B.S.K. Pediatric Surgical Associates, P.C., 1974-present.

3.

Every day I cooperate with all of the specialists involved in a child's medical care to determine whether surgery is the best option for the child. I regularly cooperate with neonatologists and pediatric otolaryngologists to manage surgical problems in children. A child with a vascular ring must be diagnosed immediately by neonatologists and/or pediatric otolaryngologists and then they must refer the child to a pediatric surgeon so that the pediatric surgeon may immediately evaluate the child for surgical division of the vascular ring.

4.

Based upon over thirty years of experience in diagnosing and surgically managing children with

vascular rings and upon a review of the certified medical records from Children's Healthcare of Atlanta which reflects the treatment that Dr. Troyer, Dr. Keyes, Dr. Gower, and Dr. Thomsen gave to N.S., it is my opinion that Dr. Troyer, Dr. Keyes, Dr. Gower and Dr. Thomsen failed to exercise that degree of skill and care ordinarily required by the medical profession in general under like conditions and similar circumstances. I have identified the following specific acts or omissions in support of his opinion:

(1) The failure of Wendy Troyer and William Keyes to diagnose and refer N. to a surgeon for evaluation of his vascular ring based upon his March 12, 2002 CAT scan, which definitively established that N.S. suffered from a vascular ring, of which he had the most common type, a right aortic arch with aberrant left subclavian. Vascular rings are life threatening conditions which must be immediately diagnosed and evaluated. It is my opinion that there is absolutely no reason why this should not have been done when symptomology was clear and definitive imaging results were in hand.

(2) Dr. Gower unnecessary performed a bilateral submandibular gland excision and bilateral parotid duct ligation that could have been avoided. Surgical division of the vascular ring would have fixed the root cause of the problem by alleviating the compression on his esophagus, thus allowing N. to swallow

correctly. Dr. Gower should have reviewed the history, including all radiology reports prior to performing the bilateral mandibular gland excision and bilateral parotid duct ligations. If she had reviewed the March 12, 2002 CAT scan report, she would have seen that N. suffered from a vascular ring and she could have avoided this procedure and all of the negative side effects that are associated with this procedure.

(3) Dr. Thomsen kept in place an unnecessary tracheostomy. The establishment of a surgical tracheostomy would have been avoided if Dr. Thomsen recognized that N.'s presentation was a consequence of his vascular ring.

5.

In order to have treated and cared for N.S. properly under these conditions, the standard of care required of Dr. Troyer, Dr. Keyes, Dr. Thomsen and Dr. Gower was as follows:

(1) The doctors should have promptly diagnosed N. with a vascular ring and immediately referred him to a surgeon or evaluation of his vascular ring for surgical division

(2) The doctors should have read and acted upon the definitive results of the CT scan taken on March 12, 2002 which established that N. had a vascular ring.

(3) The doctors should have diagnosed N. with a vascular ring and made the connection that N.'s airway problems were caused by the vascular ring. The establishment of a tracheostomy, numerous bronchoscopies and endoscopies and the bilateral mandibular gland excision and bilateral parotid duct ligations as well as the nissen fundoplication and g tube would have been avoided.

I make this affidavit under oath, after having been duly sworn on the basis of my training and medical experience as applied to a review of the records listed above. This affidavit is executed for the purpose of being attached to and used in support of the Plaintiffs' medical malpractice complaint as required by O.C.G.A. § 9-11-9.1.

/s/ David L. Schwartz, M.D.
David L. Schwartz,

Sworn to and subscribed
before me this 11th day of
Sept., 2006.

/s/ Diane Chagoll
NOTARY PUBLIC

DIANE CHAGOLL
NOTARY PUBLIC,
State of New York
No. 01CH4718947
Qualified in Nassau County
Commission Expires
February 28, 2007

IN THE SUPERIOR COURT FOR THE
COUNTY OF DEKALB STATE OF GEORGIA

TIMOTHY AND ANDREA SPACHT, INDIVIDUALLY AND AS NEXT FRIEND OF N.S., A MINOR CHILD,	)	
PLAINTIFFS,	)	FILE NO.: 06-CV-4104-4
VS.	)	
CHILDREN'S HEALTHCARE OF ATLANTA, INC., ET AL.,	)	
DEFENDANTS.	)	

TRANSCRIPT OF MOTIONS HEARING IN THE ABOVE-CAPTIONED MATTER BEFORE THE HONORABLE JOAN F. ROACH, SUPERIOR COURT, DIVISION 4, HELD ON SEPTEMBER 21, 2006, DECATUR, GEORGIA

APPEARANCES OF COUNSEL:

FOR THE PLAINTIFFS:

JOHN F. DAUGHERTY, ESQ.
ALINA A. KRIVITSKY, ESQ.

FOR DEFENDANTS KEYES AND TROYER:

ROBERT G. TANNER, ESQ.

FOR DEFENDANTS GOWER AND THOMSEN:

DARCY E. COTY, ESQ.

FOR DEFENDANT CHILDREN'S HEALTHCARE OF ATLANTA:

THOMAS E. LAVENDER III, ESQ.

DIANNE KARAMPELAS
CERTIFIED COURT REPORTER
DEKALB COUNTY COURTHOUSE
DECATUR, GEORGIA 30030

[2] **PROCEEDINGS**

THE COURT: GOOD MORNING, LADIES AND GENTLEMEN. I'M JUDGE ROACH. I'M HERE FOR JUDGE FLAKE THIS MORNING, AND I ALWAYS LIKE TO BEGIN BY THANKING JUDGE FLAKE AND HER STAFF FOR THEIR ASSISTANCE.

THIS IS A MATTER SPECIALLY SET BY JUDGE FLAKE ON A HEARING ON A MOTION TO DISMISS TO DETERMINE A LIMITED ISSUE.

ARE THE PLAINTIFFS READY TO PROCEED?

MR. DAUGHERTY: YES, MA'AM. JUDGE, THERE'S A CASE CAME OUT JUST YESTERDAY, AND I THINK IT'S DISPOSITIVE OF WHAT WE'RE HERE ABOUT. IT JUST CAME OUT BY THE COURT OF APPEALS YESTERDAY. MAY I APPROACH AND GIVE YOU THE CASE?

THE COURT: WHY DON'T I LET YOU ARGUE WHAT IT SAYS –

MR. DAUGHERTY: I WILL. WE WERE GOING TO, BUT I WAS GOING TO GIVE YOU ONE WHERE YOU KNOW WHAT I'M ARGUING WAS WHAT WAS IN THE CASE.

THE COURT: I'LL LET YOU ARGUE IT, COUNSEL, AND YOU ARE?

MR. DAUGHERTY: MY NAME IS JOHN DAUGHERTY. ME AND MS. KRIVITSKY, WE REPRESENT THE PLAINTIFFS IN THE CASE.

THE COURT: ALL RIGHT. HAVE YOU PROVIDED THE CASE TO OPPOSING COUNSEL?

MR. DAUGHERTY: I'LL LET THEM READ THEM. IT JUST CAME OUT YESTERDAY. WE GOT IT OFF THE INTERNET TODAY WHEN [3] WE CAME. THEY HAVE HAD A CHANCE TO LOOK AT IT, BUT IT'S BASICALLY EXACTLY ON POINT WHAT WE'RE HERE ABOUT.

THE COURT: IF YOU ARE READY TO PROCEED, I'LL HEAR YOUR ARGUMENT, THEN, ON THE CASE.

MR. DAUGHERTY: IT'S THEIR MOTION.

MR. TANNER: DOES YOUR HONOR HAVE A PREFERENCE ABOUT WHERE WE STAND?

THE COURT: WHEREVER YOU'RE MORE COMFORTABLE, AS LONG AS THE COURT REPORTER CAN SEE AND HEAR YOU IS FINE.

MR. TANNER: FIRST OFF, LET ME INTRODUCE MYSELF. MY NAME IS BOB TANNER. I REPRESENT, IN THIS CASE, TWO NEONATOLOGISTS, DR. KEYES AND DR. TROYER.

AS THE COURT HAS OBSERVED, THIS IS A LIMITED ISSUE, AND IT ARISES IN THE CONTEXT OF A MOTION TO DISMISS. A LONG TIME AGO, I LEARNED FROM JOEL PRYOR THAT ONE OF THE FIRST THINGS YOU OUGHT TO DO WHEN YOU STAND TO ADDRESS THE COURT IS PARTICULARIZE WHAT IT IS YOU ARE DOING AND WHAT YOU WANT THE COURT TO DO ABOUT IT.

THIS MOTION IS TO DISMISS ON BEHALF OF DR. KEYES AND TROYER, AND WE'RE ASKING THE COURT FOR THAT RELIEF, AND WE'RE ASKING ON THE SIMPLE BASIS THAT THE PLAINTIFF HAS NOT PROVIDED THE KIND OF AFFIDAVIT THAT WE FEEL THE LAW REQUIRES THAT THEY PRODUCE WHEN FILING A MEDICAL MALPRACTICE ACTION.

THE WHOLE QUESTION COMES DOWN TO THE AFFIDAVIT OF THE [4] EXPERT AND HIS EXPERTISE, AND IT BASICALLY INVOLVES THE ANALYSIS OF TWO STATUTES. THIS, OBVIOUSLY, IS A MEDICAL MALPRACTICE CASE. I DON'T THINK THERE'S ANY QUESTION ABOUT

THAT. THE PLAINTIFF FILED AN AFFIDAVIT WITH THE COMPLAINT BY A PEDIATRIC SURGEON NAMED DR. SCHWARTZ, AND THE QUESTION IS DID DR. SCHWARTZ HAVE THE NECESSARY EXPERTISE TO ALLOW HIM TO GIVE THAT AFFIDAVIT AGAINST, IN MY CASE, NEONATOLOGISTS. THERE ARE OTHER FOLKS WHO WILL TALK ABOUT THEIR SPECIALTIES. DR. SCHWARTZ WAS THE ONLY PHYSICIAN TO GIVE AN AFFIDAVIT ON BEHALF OF THE PLAINTIFF.

BECAUSE THE CASE INVOLVES THE CONSTRUCTION, I THINK, OF TWO STATUTES, I'VE MADE COPIES OF THESE TWO STATUTES AND HIGHLIGHTED WHAT I THINK ARE THE PERTINENT PORTIONS, AND I'LL BE HAPPY TO SAY TO THE COURT – HAND YOU COPIES OF THE TWO STATUTES, IF THAT WOULD BE OF ANY HELP OR –

THE COURT: I ACTUALLY HAVE COPIES OF THE STATUTES, AND JUST SO BOTH SIDES KNOW, I'VE READ MOST OF THE FILE, NOT ALL OF THE FILE, BECAUSE I BELIEVE SOME DEPOSITIONS WERE FILED EARLIER, AND I'VE READ THE COURT'S ORDER ON THIS, SO I GENERALLY DO HAVE SOME BACKGROUND AS RELATES TO THE FILE.

MR. TANNER: GREAT. LET ME BE A GOOD STEWARD OF THE COURT'S TIME AND TURN DIRECTLY TO MY ARGUMENT. YOUR

HONOR, I WOULD BEGIN WITH 9-11-9.1, THE STATUTE THAT REQUIRES, AND I'M QUOTING HERE, THAT WHEN A MALPRACTICE [5] CASE IS FILED THE PLAINTIFF MUST FILE, QUOTE, AN AFFIDAVIT OF AN EXPERT COMPETENT TO TESTIFY, WHICH AFFIDAVIT SHALL SET FORTH SPECIFICALLY AT LEAST ONE NEGLIGENT ACT OR OMISSION CLAIMED TO EXIST, END QUOTE.

NOW, THERE ARE MANY THINGS THAT AN EXPERT MAY TESTIFY ABOUT IN A MALPRACTICE CASE. AN EXPERT MIGHT TESTIFY ABOUT CAUSATION, MIGHT TESTIFY ABOUT LIFE EXPECTANCY, BUT THOSE DON'T HAVE TO BE ADDRESSED IN AN AFFIDAVIT THAT ACCOMPANIES THE INITIAL FILING OF A SUIT.

THE STATUTE IS VERY CLEAR THAT ONLY ONE THING MUST BE ADDRESSED, AND IT HAS TO BE ADDRESSED BY AN EXPERT COMPETENT TO TESTIFY ABOUT A NEGLIGENT ACT OR OMISSION. THAT'S THE ONLY THING THE PLAINTIFF HAS TO DO IS CITE A VIOLATION OF THE APPLICABLE STANDARD OF CARE BY AN EXPERT COMPETENT TO TESTIFY.

NOW, I DON'T THINK IT WOULD BE CONTROVERSIAL, I THINK EVERYONE IN THIS ROOM WILL AGREE, THAT THE STANDARD OF CARE IS THAT DEGREE OF CARE AND SKILL CUSTOMARILY EXERCISED BY PHYSICIANS GENERALLY UNDER LIKE OR SIMILAR CIRCUMSTANCES AT THE TIME THE CARE IN ISSUE AROSE.

THAT'S THE BASIC CHARGE LANGUAGE THAT IS GIVEN TO THE JURY ON EVERY MALPRACTICE CASE. SO THE ISSUE IS VERY SIMPLE: UNDER THE CIRCUMSTANCES AND LIKE SURROUNDING CONDITIONS OF THE DEFENDANT, IN MY CASE, A NEONATOLOGIST, WHAT DOES THE STANDARD OF CARE REQUIRE?

[6] THE PLAINTIFF MUST PRODUCE A PHYSICIAN WHO IS COMPETENT TO TESTIFY ABOUT THAT AND CAN TESTIFY THAT THERE WAS A VIOLATION OF THAT STANDARD.

NOW, THE OTHER STATUTE THAT I THINK IS IN PLAY IS 24-9-67.1, THE STATUTE THAT I'M SURE THE COURT HAS READ DEALING WITH, MORE SPECIFICALLY, WHAT THE REQUIREMENT IS FOR THE EXPERT TO SHOW EXPERTISE.

BEFORE I TURN TO THE LANGUAGE I'M SURE WE'RE ALL PREPARED TO DEBATE, I WOULD LIKE TO DRAW THE COURT'S ATTENTION TO SUBPARAGRAPH E. IT'S, I THINK, SOMETIMES EASY TO OVERLOOK THIS SUBPARAGRAPH, BUT THE SUBPARAGRAPH SAYS AS FOLLOWS, QUOTE – THIS IS AGAIN REFERRING TO THE EVIDENCE REQUIREMENTS: AN AFFIANT MUST MEET THE REQUIREMENTS OF THIS CODE SECTION IN ORDER TO BE DEEMED QUALIFIED TO TESTIFY AS AN EXPERT BY MEANS OF THE AFFIDAVIT REQUIRED UNDER

9-11-9.1. THAT CLEARLY TIES THESE TWO STATUTES TOGETHER.

THE AFFIDAVIT REQUIREMENT HAS TO BE, UNDER SUBPARAGRAPH E, READ IN LIGHT OF THE REQUIREMENTS FOR SPECIFIC KNOWLEDGE.

WHEN YOU PUT THOSE TWO TOGETHER, WHEN YOU CONSTRUE THEM TOGETHER, I THINK CLEARLY WHAT THE STATUTES ARE TELLING US IS WHEN THE PLAINTIFF COMES INTO COURT WITH THEIR AFFIDAVIT, THEY FILE IT WITH THEIR COMPLAINT, THEY MUST HAVE AN AFFIDAVIT OF AN INDIVIDUAL WHO IS COMPETENT [7] TO TESTIFY ABOUT THE LIKE SURROUNDING CIRCUMSTANCES AND CONDITIONS OF THE DEFENDANT, WHO KNOWS, ON A DAY-TO-DAY BASIS, WHAT THE DEFENDANTS DO AND WHETHER OR NOT THEIR CONDUCT REPRESENTS A VIOLATION OF THE APPLICABLE STANDARD OF CARE.

AND THEN WHEN WE LOOK AT THE REST OF THE STATUTES, SPECIFICALLY 24-9-67.1(C), BEGIN PAREN SUB 2, THE STATUTES SAY THAT YOU HAVE TO HAVE THIS KNOWLEDGE BY VIRTUE OF HAVING BEEN REGULARLY ENGAGED IN THE ACTIVE PRACTICE OF SUCH SPECIALTY OF HIS OR HER PROFESSION FOR AT LEAST THREE OF FIVE YEARS, WHICH IS NOT IN ISSUE HERE, WITH SUFFICIENT FREQUENCY TO ESTABLISH AN APPROPRIATE

LEVEL OF KNOWLEDGE, AS DETERMINED BY THE JUDGE, IN PERFORMING THE PROCEDURE, DIAGNOSING THE CONDITION, OR RENDERING TREATMENT WHICH IS ALLEGED TO HAVE BEEN PERFORMED OR RENDERED NEGLIGENTLY BY THE DEFENDANT.

IT'S CLEAR THE STATUTE BASICALLY, TO PARTICULARIZE THIS CASE, SAYS THE PLAINTIFFS' EXPERT HAS TO SHOW THE COURT, IN SUCH A FASHION THAT THE COURT IS CONFIDENT THAT THE TRAINING AND EXPERIENCE EXISTS, THAT THIS EXPERT HAS THE KNOWLEDGE THAT YOU WOULD EXPECT OF A NEONATOLOGIST OR THAT WOULD BE EXPECTED OF A NEONATOLOGIST TO PERFORM HIS OR HER JOB. THAT'S THE ESSENCE OF THE MOTION.

IT'S OUR POSITION, OBVIOUSLY, I WOULDN'T BE HERE IF I THOUGHT THE PLAINTIFFS' ATTORNEY HAD MET THAT BURDEN. WE [8] FEEL THAT THEY'VE NOT.

NOW, UP UNTIL THIS MORNING, I WAS UNDER THE IMPRESSION THAT THE BASIC DOCUMENT BY WHICH THE PLAINTIFF SOUGHT TO FULFILL THIS BURDEN WAS THE AFFIDAVIT THAT WAS INITIALLY FILED WITH THE COMPLAINT.

THE AFFIDAVIT AS INITIALLY FILED WITH THE COMPLAINT DOES NOT SET FORTH, ON THE PART OF DR. SCHWARTZ, ANY KNOWLEDGE ABOUT WHAT NEONATOLOGISTS DO ON

A DAY-TO-DAY BASIS. IT DOES NOT SPECIFY ANYTHING ABOUT HIS DAY-TO-DAY WORK TO SPECIFY EXACTLY HOW HE MIGHT KNOW ANYTHING ABOUT WHAT THAT PARTICULAR SPECIALTY OF MEDICINE DOES, AND I WOULD POINT OUT TO THE COURT, SINCE THE COURT'S READ THE MATERIAL, I DON'T THINK THIS NEEDS TO BE BELABORED, BUT THE SPECIALTY OF NEONATOLOGY IS A NONSURGICAL SPECIALTY.

MY DOCTORS DON'T DO OPERATIONS. THEY DON'T – THEY JUST DON'T GO TO THE OPERATING ROOM AND OPERATE ON PEOPLE. THEY'RE NOT ALLOWED TO. THEY'RE NOT CREDENTIALED TO. THEY CAN'T DO IT.

DR. SCHWARTZ, IN HIS INITIAL AFFIDAVIT, SIMPLY, PARAGRAPH 4 IS AS CLOSE AS HE COMES TO SETTING FORTH ANY BACKGROUND INFORMATION ABOUT HIMSELF. HE DOESN'T SAY ANYTHING HERE ABOUT BEING A MEMBER OF ANY NEONATOLOGICAL ASSOCIATIONS OR GROUPS OR PROFESSIONS OR ANYTHING ELSE.

NOW, BASED ON THAT, I THINK OUR MOTION SHOULD BE GRANTED. HE HAS SIMPLY FAILED TO SET FORTH THAT HE KNOWS [9] THE LIKE SURROUNDING CIRCUMSTANCES AND DAY-TO-DAY ACTIVITIES OF A NEONATOLOGIST SUCH THAT HE COULD GIVE A REASONABLE OPINION AS TO WHETHER OR NOT THEIR FAILURE TO DO WHAT HE SAYS THEY

SHOULD HAVE DONE REPRESENTS A DEPARTURE FROM THE STANDARD OF CARE.

HE SAYS, AND I'M LOOKING HERE AT HIS AFFIDAVIT, PARAGRAPH TWO, IT IS MY OPINION THERE'S ABSOLUTELY NO REASON WHY THIS SHOULD NOT HAVE BEEN DONE, MEANING THE DIAGNOSIS OF THIS CONDITION, WHEN THE SYMPTOMATOLOGY WAS CLEAR AND DEFINITIVE IMAGING RESULTS WERE IN HAND.

SO HE FEELS THAT THE NEONATOLOGIST SHOULD HAVE TAKEN SOME ACTION, BUT HE – SIMPLY CUT TO THE CHASE – HE DOESN'T SET FORTH ANY BASIS OF BEING ABLE TO SAY BASED ON HAVING HAD THE SAME TRAINING AS A NEONATOLOGIST, HAVING HAD THE SAME WORK EXPERIENCE AS THE NEONATOLOGIST THAT THE AVERAGE, COMPETENT NEONATOLOGIST WOULD, IN FACT, KNOW THAT, AS OPPOSED TO SOME OTHER SPECIALTY.

NOW, I AM TOLD THAT THERE IS ANOTHER AFFIDAVIT THAT HAS BEEN SUBMITTED, AND I HAVE NOT SEEN IT YET. I WAS TOLD IT WAS FILED ON THE 18TH. IT HAD NOT MADE IT TO MY OFFICE AS OF YESTERDAY, AND MAYBE THAT'S THE MAIL'S FAULT, I DON'T KNOW, BUT I HAVE HAD A CHANCE TO GLANCE AT IT THIS MORNING, AND I DON'T KNOW WHETHER IT'S ON FILE WITH THE COURT OR NOT. IF IT'S NOT

ON FILE, I DON'T THINK WE NEED TO ADDRESS IT.

[10] THE COURT: THERE IS A MOTION TO SUPPLEMENT THE AFFIDAVIT THAT IS FILED WITH THE COURT.

MR. TANNER: AND I WOULD SUBMIT AT THIS POINT, HAVING ONLY HAD AN OPPORTUNITY TO BRIEFLY LOOK AT THAT AFFIDAVIT, MY READING OF IT DOES NOT CONVINCE ME THAT THE PLAINTIFF HAS OVERCOME THE BURDEN THAT THEY'VE GOT.

DR. SCHWARTZ IS A SURGEON, HAS THE TRAINING OF A SURGEON, AND WE – I WOULD POINT OUT FROM THE DEPOSITIONS AND THE AFFIDAVIT OF DR. KEYES AND TROYER WHO POINT OUT QUITE CLEARLY THAT SURGEONS HAVE A DIFFERENT ACTIVITY. SURGEONS ARE BOARDED OR CREDENTIALED, CERTIFIED BY A DIFFERENT BOARD. THEY HAVE A DIFFERENT RESIDENCY. THEY HAVE DIFFERENT CREDENTIALS IN A HOSPITAL THAT ARE GRANTED BY DIFFERENT DEPARTMENTS, SURGICAL DEPARTMENTS VERSUS NONSURGICAL DEPARTMENTS.

SO THE FACT THAT DR. SCHWARTZ MAY, FROM TIME TO TIME, WORK WITH A NEONATOLOGIST, WHICH I BELIEVE IS ALL THE AFFIDAVIT SAYS, DOES NOT, IN MY VIEW, MAKE HIM AN EXPERT TO SAY, LOOKING AT THE CASE FROM THE STANDPOINT OF A NEONATOLOGIST,

WITH THE MEDICAL TRAINING THEY HAVE, WITH THE RESIDENCY TRAINING THEY HAVE, WITH THE DAY-TO-DAY CONTINUING EDUCATION AND EXPERIENCE THEY HAVE, A NEONATOLOGIST FACING THIS SITUATION, ENTIRELY NONSURGICAL FROM THEIR VIEW, FROM THEIR PERSPECTIVE OF WHAT THEY DO, WOULD BE EXPECTED TO MAKE THIS CALL.

[11] THAT'S WHAT IS NOT BEING SAID HERE, AND I DON'T BELIEVE THEY HAVE SHOWN THE NECESSARY BACKGROUND AND EXPERTISE AND TRAINING ON THE PART OF DR. SCHWARTZ TO CARRY THE BURDEN THAT THEY HAVE TO UNDER THE STATUTE.

I COULD – YOU KNOW, I COULD PROLONG MY ARGUMENT, BUT I THINK THE COURT UNDERSTANDS OUR POSITION, AND BASED UPON THAT, I'LL YIELD THE FLOOR TO OTHERS.

THE COURT: THANK YOU, COUNSEL.

MS. COTY: GOOD MORNING, YOUR HONOR. MY NAME IS DARCY COTY. I REPRESENT DR. GOWER AND DR. THOMSEN IN THIS CASE. THEY ARE TWO PEDIATRIC OTOLARYNGOLOGISTS NAMED BY THE DEFENDANTS.

WE WERE EXPECTING A LITTLE MORE OF AN EVIDENTIARY HEARING THIS MORNING, IN LIGHT OF JUDGE FLAKE'S ORDER, AND IN LIGHT OF THAT, WE CAME IN THIS MORNING, FILED THE ORIGINAL AFFIDAVITS OF EACH OF

OUR CLIENTS WITH THE CLERK. I KNOW YOU DON'T HAVE THOSE YET, SINCE WE JUST FILED THEM THIS MORNING. CAN I GIVE COPIES TO YOU, SINCE I KNOW THAT YOU DON'T HAVE THEM, OR WILL THE CLERK'S OFFICE FORWARD THEM TO YOU LATER?

THE COURT: YOU CAN GIVE ME A COPY. DOES OPPOSING COUNSEL HAVE A COPY?

MS. COTY: YES, THEY DO. I'VE SERVED ALL PARTIES, AND, OF COURSE, WE FILED THOSE THIS MORNING, IN LIGHT OF THE FACT WE KNEW THIS WAS AN EVIDENTIARY HEARING WHERE WE [12] WOULD BE PERMITTED TO PRESENT EVIDENCE, BUT IT SEEMS THAT DR. SCHWARTZ IS NOT HERE AS WE EXPECTED.

I DON'T WANT TO SPEND A LOT OF TIME REHASHING EITHER THE ARGUMENTS MADE IN OUR BRIEF, ESPECIALLY SINCE THEY WERE SUCCINCTLY SET FORTH IN JUDGE FLAKE'S ORDER, AND I DON'T WANT TO REHASH A LOT OF WHAT MR. TANNER HAS ALREADY SAID, THOUGH WE WOULD CERTAINLY ADOPT THE ARGUMENT THAT MR. TANNER HAS MADE AS IT APPLIES TO OUR CLIENTS, THE PEDIATRIC OTOLARYNGOLOGISTS IN THIS CASE.

I THINK WE SEE THIS CASE A LITTLE BIT DIFFERENTLY THAN THE PLAINTIFFS, IN TERMS OF WHAT THE AFFIDAVIT ISSUE IS. IT'S NOT SIMPLY A FACT THAT DR. SCHWARTZ, A

PEDIATRIC SURGEON, IS IN A DIFFERENT SPECIALTY THAN THE PEDIATRIC OTOLARYNGOLOGISTS, BUT IT'S ALSO THE FACT THAT DR. SCHWARTZ SIMPLY DOES NOT DO THE PROCEDURES THAT DR. – THAT HE ALLEGES DR. GOWER AND DR. THOMSEN NEGLIGENTLY PERFORMED; AND IF HE DOES NOT PERFORM THOSE PROCEDURES, HAVE EXPERIENCE PERFORMING THOSE PROCEDURES, ROUTINELY DO THOSE PROCEDURES, THEN CERTAINLY HE WOULD NOT HAVE THE KNOWLEDGE OF THE LIKE SURROUNDING CIRCUMSTANCES IN WHICH DR. GOWER OR DR. THOMSEN ARE OUT PRACTICING AS PEDIATRIC OTOLARYNGOLOGISTS AND DOING THE EXACT PROCEDURES THAT THEY ALLEGEDLY DID NEGLIGENTLY.

I ALSO DIDN'T RECEIVE A COPY OF DR. SCHWARTZ'S SUPPLEMENTAL AFFIDAVIT, BUT MR. DAUGHERTY WAS KIND ENOUGH [13] TO LET ME TAKE A LOOK AT IT THIS MORNING, AND I DON'T THINK IT REALLY CHANGES ANYTHING. I THINK IT SORT OF REITERATES A LOT OF WHAT WE SEE IN DR. SCHWARTZ'S INITIAL AFFIDAVIT, WHICH IS HIS KNOWLEDGE AS A GENERAL PEDIATRIC SURGEON; THE FACT THAT HE WAS TRAINED AS A PEDIATRIC SURGEON; THAT HIS RESIDENCY AND FELLOWSHIP TRAINING WAS IN A DIFFERENT FIELD, AGAIN, PEDIATRIC SURGERY; THAT HE PRACTICES AND TEACHES IN THAT FIELD; AND THAT HE

HAS NO EDUCATION, NO TRAINING, AND NO EXPERIENCE PRACTICING IN A DAY-TO-DAY SITUATION AS A PEDIATRIC OTOLARYNGOLOGIST OR PERFORMING THE ACTUAL PROCEDURES THAT PEDIATRIC OTOLARYNGOLOGISTS PERFORM.

AND AS YOU'LL SEE IN THE AFFIDAVITS OF DR. GOWER AND DR. THOMSEN, WHAT THEY'VE SAID IS THAT THE PROCEDURES THAT ARE AT ISSUE IN THIS CASE ARE SIMPLY NOT PERFORMED BY PEDIATRIC SURGEONS AND THAT THERE'S NO OVERLAP WHEN IT COMES TO THOSE SPECIFIC AREAS OF WHICH DR. SCHWARTZ IS CRITICAL OF THEM.

AT THIS POINT, BASED ON THE EVIDENCE THAT THE PLAINTIFFS HAVE PUT FORTH IN TERMS OF THE TWO AFFIDAVITS THEY'VE SUBMITTED BY DR. SCHWARTZ, THERE'S NOTHING TO REBUT THAT ASSERTION THAT DR. GOWER AND DR. THOMSEN HAVE MADE.

AND IN TERMS OF THEN LOOKING AT THE COMBINATION OF SECTION 9-11-9.1 AND SECTION 24-9.67.1, IT'S CLEAR THAT [14] DR. SCHWARTZ DOESN'T HAVE ACTUAL PROFESSIONAL KNOWLEDGE AND EXPERIENCE EITHER IN PRACTICING FOR THREE OF THE LAST FIVE YEARS OR TEACHING FOR THREE OF THE LAST FIVE YEARS AS A PEDIATRIC OTOLARYNGOLOGIST. AND BEYOND THE FACT THAT IT'S A DIFFERENT SPECIALTY, WHEN YOU REALLY

LOOK AT DOES HE HAVE THE EXPERIENCE TO COMMENT ON WHAT'S AT ISSUE IN THIS CASE, AS IT RELATES TO DR. GOWER AND DR. THOMSEN, THERE'S NOTHING THAT SHOWS THAT FOR THREE OF THE LAST FIVE YEARS HE HAS, WITH SUFFICIENT FREQUENCY – THAT HE HAS EXPERIENCED PERFORMING THE EXACT OTOLARYNGOLOGICAL PROCEDURES THAT DR. – I KNOW IT'S QUITE A HEFTY WORD – THAT DR. GOWER AND DR. THOMSEN ALLEGEDLY NEGLIGENTLY PERFORMED.

AND IF YOU LOOK AT DR. SCHWARTZ'S INITIAL AFFIDAVIT, THE ONLY ASSERTIONS THAT ARE LODGED BY DR. SCHWARTZ IS THAT DR. THOMSEN WAS NEGLIGENT FOR PLACING A TRACHEOTOMY AND THAT DR. GOWER NEGLIGENTLY PERFORMED A SUBMANDIBULAR GLAND INCISION AND PAROTID DUCT LIGATION. BUT NOWHERE IN THE AFFIDAVITS DOES IT SAY, I HAVE EXPERIENCE, EDUCATION, TRAINING, AND AM DOING, ON A DAY-TO-DAY BASIS, TRACHEOTOMIES OR PERFORMING SUBMANDIBULAR GLAND INCISIONS AND PAROTID DUCT LIGATIONS, SUCH THAT I'M QUALIFIED TO SAY THAT IT WAS NEGLIGENT TO HAVE PERFORMED THESE PROCEDURES.

IN LIGHT OF THIS, YOUR HONOR, AND IN LIGHT OF THE FACT THAT PLAINTIFFS HAVE FAILED TO MEET THEIR BURDEN OF [15] PROVIDING THE AFFIDAVIT OF AN EXPERT WHO IS COMPETENT TO PRESENT EXPERT TESTIMONY

AGAINST THE TWO PEDIATRIC OTOLARYNGOLOGISTS IN THIS CASE, DR. THOMSEN AND DR. GOWER, WE WOULD RESPECTFULLY ASK THE COURT TO GRANT OUR MOTION TO DISMISS.

THE COURT: THANK YOU, COUNSEL.

MR. LAVENDER: YOUR HONOR, I'M TED LAVENDER. I REPRESENT CHILDREN'S HEALTHCARE OF ATLANTA IN THIS CASE. WE DO NOT CURRENTLY HAVE A MOTION PENDING BEFORE THIS COURT, BUT WE'RE IN A PARTICULAR AND PECULIAR SITUATION DIFFERENT FROM THE OTHER DEFENDANTS IN THIS CASE.

WE ARE IN THIS CASE STRICTLY THROUGH VICARIOUS LIABILITY, AS IT APPLIES TO THE FOUR PHYSICIANS WHO ARE REPRESENTED BY THESE TWO ATTORNEYS HERE.

WE INITIALLY FILED A MOTION TO DISMISS WITH OUR ANSWER ON THE BASIS THAT THERE WERE NO ALLEGATIONS IN DR. SCHWARTZ'S COMPLAINT AGAINST CHILDREN'S HEALTHCARE OF ATLANTA.

THE COURT: IF I REMEMBER, YOUR MOTION TO DISMISS HAS ALREADY BEEN DENIED; IS THAT CORRECT?

MR. LAVENDER: THAT IS CORRECT, AND I'M NOT HERE – I'M HERE TO ASK THE COURT TO RECONSIDER IT ON THE LIMITED

BASIS THAT IF THE COURT DEEMS – IF THE COURT GRANTS THE MOTIONS OF THE NEONATOLOGISTS OR THE ENT/OTOLARYNGOLOGISTS, THEN I WOULD REQUEST THE COURT'S [16] ORDER INCLUDE DISMISSING THOSE CLAIMS AGAINST CHILDREN'S HEALTHCARE THAT ARE VICARIOUS CLAIMS THROUGH THOSE FOUR PHYSICIANS, OR ANY NUMBER OF THOSE PHYSICIANS, THAT THE COURT DISMISSES ON THE BASIS THAT – AND I THINK EVERYONE WOULD AGREE – THAT IF YOU ARE GOING TO ACCUSE THE PRINCIPAL OF SOMETHING, THEN YOU HAVE TO HAVE AN ADEQUATE AFFIDAVIT AGAINST THE AGENT WHO IS THE ONE WHO IS ACCUSED OF ACTUALLY COMMITTING THE NEGLIGENCE, AND THAT IS THE ONLY REASON THAT CHILDREN'S HEALTHCARE OF ATLANTA IS IN THIS CASE AS IT PERTAINS TO THE FOUR PHYSICIANS REPRESENTED HERE TODAY.

NOW, THERE WAS AN AMENDED COMPLAINT, AND THERE ARE SEPARATE – THERE'S A SEPARATE ALLEGATION AGAINST CHILDREN'S HEALTHCARE NOW THAT IS SEPARATE FROM THE PHYSICIANS. SO I'M NOT ASKING THAT WE BE DISMISSED ENTIRELY. I'M ASKING SIMPLY THAT TO THE EXTENT THAT THE COURT DISMISSES DRS. TROYER, KEYES, GOWER, OR THOMSEN THAT THE ORDER BE SUCH THAT ANY LIABILITY ALLEGED TO HAVE OCCURRED OR ALLEGED THAT THEY COMMITTED, THAT CHILDREN'S HEALTHCARE OF ATLANTA ALSO BE

DISMISSED FROM THOSE CLAIMS AS WELL. THANK YOU.

THE COURT: THANK YOU, COUNSEL.

MR. DAUGHERTY, IT'S YOUR TURN.

MR. DAUGHERTY: YES, MA'AM. YOUR HONOR, SO THE COURT HAS A LITTLE BACKGROUND, SINCE THIS TIME, WE HAVE TAKEN [17] DEPOSITIONS OF MOST OF THESE PEOPLE, AND THE COURT MAY BE AWARE, THESE PEOPLE, THEY ARE ON – THE DOCTORS THAT WE'RE SUING CLAIM THAT THEY HAD ABSOLUTELY NOTHING TO DO WITH VASCULAR RINGS. THIS IS NOT ABOUT A NEGLIGENCE OF PERFORMING A PROCEDURE, YOUR HONOR. THIS IS NOT – WHAT THIS IS ABOUT IS THIS WAS A CHILD WHO WAS BORN WITH A VASCULAR RING.

THE CHILD WAS TAKEN TO THE HOSPITAL WHERE THEY WERE CALLED – THESE DOCTORS WERE CALLED IN TO SEE THIS CHILD. IT IS CLEAR THROUGHOUT THE TIME THAT THEY DID IT THAT THIS CHILD WAS HAVING PROBLEMS BREATHING, HAS ASPIRATING, HAS HOARSENESS OF BREATH, AND WASN'T ABLE TO EAT. THESE ARE ALL – PLUS REFLUX. WE ALSO KNOW THAT REFLUX IS ALSO A CONDITION OF VASCULAR RINGS.

DURING THE TREATMENT AT THE HOSPITAL, WHEN WE TOOK THE DOCTORS' – ONCOLOGISTS' (SIC) DEPOSITION, THEY INDICATE THAT THEY DON'T KNOW ANYTHING ABOUT VASCULAR RINGS; HOWEVER, IN THEIR DEPOSITIONS, WE SHOW THAT 12 PERCENT OF THEIR TEST TO GET BOARD CERTIFIED, JUDGE, DEALS WITH RESPIRATORY AND DIAGNOSIS AND MANAGEMENT OF VASCULAR RINGS. SO THE AFFIDAVITS YOU HAVE BEEN GIVEN IS – WE SAY IS NOT, IF YOU HAVE THE DEPOSITION, IS NOT SO.

PLUS THE DEFENSE ATTORNEY FOR THESE DOCTORS, DR. KEYES, DR. TROYER, THEY REFUSED TO LET US EXAMINE THEM [18] ON THEIR AFFIDAVIT. WE DON'T THINK IT CAN BE USED ANYWAY, BUT WE DON'T THINK THAT'S DISPOSITIVE OF THE ISSUE ANYWAY.

WHAT THE COURT, AND I DON'T KNOW IF THE – I DON'T BELIEVE THE COURT HAS THEM, BUT IS – THERE'S A NEW CASE THAT'S COME OUT, AND, OF COURSE, THE COURT IN ITS ORDER INDICATED UNDER *LENNEN VS. DEPARTMENT OF TRANSPORTATION*, THAT WE HAD A RIGHT, AND AS WE DO UNDER THE LAW, TO AMEND OUR AFFIDAVIT TO SAY WHAT OUR QUALIFICATIONS ARE.

NOW, I BELIEVE THE COURT HAS OUR AFFIDAVIT OF DR. SCHWARTZ. WE CHECKED AND IT WAS FILED THREE OR FOUR DAYS AGO,

AND WE CHECKED WITH THE COURT, AND THEY SAID IT WAS IN YOUR OFFICE, AND I – WHAT WE WANT TO TALK ABOUT IS, IN THIS CASE, THIS IS A – THIS IS A – WHERE THE DOCTORS FAILED TO TREAT AN ABSOLUTE, AND REFER OUT TO SPECIALISTS, YOUR HONOR, A DIAGNOSED, FOUND, CONFIRMED VASCULAR RING.

WE HAVE TAKEN A DEPOSITION OF DR. KANTER ALREADY, WHO IS A TREATING PHYSICIAN, WHO DIVIDED THE VASCULAR RING, AND HE HAS GIVEN TESTIMONY, JUDGE, UNEQUIVOCALLY THIS: THAT THE CHILD HAD BREATHING PROBLEMS, ASPIRATION IN HIS LUNGS –

THE COURT: COUNSEL, HELP ME UNDERSTAND HOW THAT GOES TO DR. SCHWARTZ AS AN EXPERT THAT CAN TESTIFY –

MR. DAUGHERTY: I'M GETTING READY TO TELL THAT BASICALLY IS – VASCULAR RINGS NEED TO BE DEALT WITH [19] PEOPLE IMMEDIATELY; THAT THEY NEED – WHEN YOU HAVE THAT, THOSE NEED TO GO TO PEOPLE WHO DEAL WITH VASCULAR RINGS.

NOW, IF YOU LOOK AT THE AFFIDAVIT OF DR. SCHWARTZ, HE GIVES YOU ALL OF HIS QUALIFICATIONS, HOW FOR MORE THAN 30 YEARS HE'S BEEN TEACHING, ALL THIS STUFF. HE ALSO INDICATES THAT HE WORKS WITH AND – CONTINUOUSLY IN DIAGNOSING AND

TREATING WITH THE ENT'S, ONCOLOGISTS (SIC); THAT HE – THAT'S WHAT HE DOES. HE HAS KNOWLEDGE AND HE WORKS WITH THEM AND DIAGNOSES AND HE PERFORMS THE SURGERY, AND THEY'RE SUPPOSED TO, BASICALLY, REFER THESE THINGS OVER TO HIM WHENEVER THEY FIND A VASCULAR RING.

WHAT WE'RE HERE ABOUT, YOUR HONOR, IS – THE FACT IS THAT WE HAVE A CT SCAN UNEQUIVOCALLY SHOW THAT IN MARCH, RIGHT AFTER THE CHILD WAS BORN, THERE WAS ABSOLUTELY A VASCULAR RING. WE HAVE TAKEN – NONE OF THESE DOCTORS EVER MENTION ANYWHERE IN ANY OF THEIR RECORDS ANYWHERE ABOUT – ANYTHING ABOUT THIS VASCULAR RING.

THE EVIDENCE IS PRETTY CLEAR, WHEN YOU HAVE A VASCULAR RING, THERE IS NO TREATMENT FOR A VASCULAR RING OTHER THAN SURGERY, PERIOD. THESE PEOPLE DID NOT REFER THIS CHILD OUT TO A PERSON. THEY KNEW – IT WAS RIGHT THERE AS A VASCULAR RING. THEY'RE RESPONSIBLE FOR LOOKING AT THE TESTS. THEY'RE RESPONSIBLE FOR LOOKING AT THE RECORDS. THEY'RE RESPONSIBLE ON TESTS THAT THEY ORDERED, TO LOOK AT, AND THESE TESTS CAME BACK UNEQUIVOCALLY THAT – [20] THE CHILD HAD A VASCULAR RING.

THE COURT: ISN'T THE ISSUE WHETHER DR. SCHWARTZ KNOWS ENOUGH ABOUT WHAT THESE DEFENDANT PHYSICIANS DO –

MS. KRIVITSKY: NO, THAT'S NOT THE ISSUE. THAT'S NOT THE ISSUE –

THE COURT: I'M SORRY. I'M SORRY.

MR. DAUGHERTY: UNDER THE NEW CASE LAW – THAT'S WHAT I'M GETTING AROUND TO, THE COURT HAS COME OUT WITH TWO CASES, JUDGE, ONE WHICH WAS DECIDED – WHICH ABSOLUTELY THROWS ALL THEIR THEORY OUT THAT THEY'VE TALKED TO YOU ABOUT. THEY'RE FAMILIAR – I KNOW THEY'RE FAMILIAR WITH THE CASE IN JULY, AND THEY FORGOT TO MENTION THAT CASE TO YOU. THERE'S A CASE THAT CAME OUT IN JULY WHICH IS CALLED – DO YOU HAVE IT THERE? DO YOU HAVE THE JULY CASE? YES – WHICH IS CALLED *COTTEN VS. PHILLIPS*, CITED JULY THE 6TH, 2006. I'LL – IF I CAN GIVE –

THE COURT: ALL RIGHT.

MR. DAUGHERTY: – THE CASE TO THE COURT. THIS ABOUT THE SAME SPECIALTY IS A BUNCH OF PHOOEY. MATTER OF FACT, THE COURT SAYS THAT IN THAT DECISION, IT'S A BUNCH OF PHOOEY; THAT YOU DON'T HAVE TO HAVE – WHERE PEOPLE HAVE CASES OR DO SOMETHING WRONG, YOU DON'T HAVE TO HAVE A DOCTOR IN EVERY SPECIALTY TO

COME IN AND SUE THE DOCTORS WHO SCREWED UP. ALL YOU HAVE TO DO IS HAVE A DOCTOR WHO CAN TESTIFY TO HIS EXPERTISE.

[21] AND THIS WAS FURTHERMORE UPHELD YESTERDAY – EXCUSE ME – DAY BEFORE YESTERDAY BY THE COURT OF APPEALS WHO CAME OUT ON SEPTEMBER THE 20TH, WHICH I THINK IS ABSOLUTELY – IT MAKES THIS MOTION MOOT, YOUR HONOR. AS A FURTHER DECISION, ON SEPTEMBER THE 20TH, OUR COURT OF APPEALS RULED IN THE CASE OF *ABRAMSON, ET AL., VS. WILLIAMS*, IT IS NUMBER A06A1493, DECIDED SEPTEMBER THE 20TH, 2006, AND THEY PRETTY MUCH ADDRESSED EXACTLY WHAT THE PLAINTIFFS IN THIS CASE WERE ARGUING, PRETTY MUCH UNEQUIVOCALLY TO THE TEE.

THEY TRIED TO SAY THAT THEY HAD TO HAVE SOMEONE WHO COULD TESTIFY ABOUT WHAT ONCOLOGISTS (SIC) DO OR WHAT ENT'S DO. THEY SAID, NO, THAT'S NOT SO. THAT'S NOT THE ISSUE IN A MEDICAL MALPRACTICE CASE. THE ISSUE IS CAN THEY TESTIFY ABOUT WHAT THEIR SPECIALTY IS AND WHAT IT WAS – THIS IS THE CAUSATION.

WHAT HAPPENED WAS, JUDGE, THIS CHILD HAD A TRACH, HAD ALL THESE PROBLEMS, AND IT HAD – THE ARTERY GREW AROUND THE CHILD'S WINDPIPE, AND WHEN YOU HAVE

THAT, YOU END UP WITH CHOKING. YOU END UP WITH HOARSENESS OF BREATH, AND YOU END UP WITH NOT BEING ABLE TO EAT.

NOW – OR THRIVE. THAT'S WHAT THEY CALL IT. AND WHEN YOU HAVE THOSE, IT'S PRETTY CLEAR THERE'S NO TREATMENT FOR A VASCULAR RING OTHER THAN SURGERY. AND THESE PEOPLE, ONCE YOU HAVE THESE SYMPTOMS, ONLY THING YOU [22] DO IS REFER IT, AND WE HAVE THIS BACKUP OPINION FROM DR. SCHWARTZ – EXCUSE ME – FROM DR. KANTER, ONLY THING YOU DO IS REFER IT TO A SPECIALIST, A VASCULAR RING, WHO IMMEDIATELY TAKES THE CHILD TO SURGERY AND DIVIDES THE VASCULAR RING, AND THEY DID THIS TO THIS CHILD TWO-AND-A-HALF YEARS LATER AND ALL THE SYMPTOMS LEFT. FOR TWO-AND-A-HALF YEARS, THEY REMOVED SALIVARY GLANDS. THEY STAPLED HIS STOMACH UP. THEY PUT TUBES IN HIM. THEY KEPT HIM ON A TRACH, AND THEY TOOK THE VASCULAR RING OUT, JUDGE, AND THE SAME DAY THEY TOOK THE VASCULAR RING OUT, HE NEVER NEEDED THE TRACH AGAIN, NEVER HAD ANY OTHER PROBLEMS. THAT IS UNDISPUTED IN THIS CASE.

NOW, DR. SCHWARTZ IS AN EXPERT WHO GAVE AN OPINION THAT THESE NEONATOLOGISTS, THESE ENT'S, WHEN YOU HAVE A VASCULAR RING, HE WORKED WITH – THEY SHOULD GIVE THEM TO HIM. ONCE THE

SYMPTOMS ARE THERE, THE CHILD NEEDS TO IMMEDIATELY GO TO SURGERY AND REMOVE THE VASCULAR RING. THEY DIDN'T DO IT.

THIS IS FAILURE TO DIAGNOSE. THIS IS NOT A SUIT ABOUT THEM PERFORMING A NEGLIGENT SURGERY. THIS IS ABOUT THEM PERFORMING A SURGERY THAT SHOULD HAVE NEVER BEEN DONE BECAUSE THE KID NEVER HAD ANY OF THIS STUFF. HE HAD A VASCULAR RING. THESE ARE ALL SYMPTOMS FOR WHAT THEY WERE DOING. THEY WERE REMOVING THE KID'S SALIVARY GLANDS BECAUSE THE SALIVA'S STOPPING UP AND GOING INTO HIS LUNGS [23] WHEN, IN FACT, HE HAD A VASCULAR RING AROUND HIS – AROUND HIS TRACHEA, JUDGE, THAT WAS –

THE COURT: I'M NOT SURE HOW THAT GOES TO THE EXPERT ISSUE THAT IS BEFORE THE COURT.

MR. DAUGHERTY: THAT'S CORRECT. SO WHAT THEY'RE SAYING IS VERY SIMPLY, AND HE CAN TESTIFY AS TO THE CAUSATION AND WHAT IT IS, AND YOU DON'T HAVE TO HAVE AN ENT, BECAUSE ENT'S DO NOT OPERATE ON VASCULAR RINGS. THEY DO NOT. THEY CAN GO IN, AND THEY ADMITTED THAT THEY KNEW THEY HAD A VASCULAR RING. THEY'VE ADMITTED THEY NEVER CALLED IN A PERSON WHO DOES SURGERY SPECIFICALLY TO TREAT

VASCULAR RINGS FOR THIS CONDITION. WE'VE TAKEN THEIR DEPOSITION.

NOW, WHAT WE GOT, VERY SIMPLY, IS A CASE – IS CAN OUR EXPERT COME FORWARD AND SAY THERE WAS AN ABSOLUTE, UNEQUIVOCAL TEST SHOWS A VASCULAR RING ON THE CT SCAN. WE HAVE THE TESTIMONY OF THE DOCTOR THAT HE REVIEWED THE CT SCAN, HE REVIEWED THE FILMS, AND IT WAS THE SAME THING, THIS IS DR. KANTER, ON THE CT SCAN REPORT, ON THE CT SCAN ITSELF, AND AS WELL IN THE SURGERY, THEY WERE ALL THE SAME. THE KID HAD A VASCULAR RING AND THAT THE SURGERY SHOULD HAVE BEEN DONE IMMEDIATELY AFTER THE CT SCAN.

NOW, WE'RE HERE WITH DR. SCHWARTZ SAYING HE DOES PEDIATRIC SURGERY. HE DOES VASCULAR RINGS. HE WORKS WITH THEM. ESSENTIALLY, THEY WERE NEGLIGENT IN NOT GETTING [24] THIS CHILD OVER TO THEM TO WHERE THEY COULD DO THE SURGERY, AND THEN ALL THESE SURGERIES THESE TWO-AND-A-HALF YEARS AND ALL THESE COMPLICATIONS AND LIFETIME THINGS WOULD HAVE NEVER BEEN A PROBLEM BECAUSE THEY WERE NEVER NECESSARY, BECAUSE THESE WERE ALL PROBLEMS WITH VASCULAR RINGS AND NOT – WAS NOT A PROBLEM – THEY SAID HE HAD A SWALLOWING PROBLEM. THEY SAID HE HAD A SWALLOWING PROBLEM. THEY TOOK

THE VASCULAR RING OUT, JUDGE, DR. KANTER DID, TWO-AND-A-HALF YEARS LATER. HE HAD IT TEN MINUTES BEFORE THEY REMOVED THE VASCULAR RING. TEN MINUTES AFTER HE REMOVED THE VASCULAR RING, HE DIDN'T HAVE IT. IT'S GONE. ALL THIS STUFF IS GONE.

IT'S A TERRIBLE THING THAT'S HAPPENED TO THIS CHILD, AND WE'RE JUST IN HERE BASICALLY TESTIFYING THAT THEY HAD THE VASCULAR RING. THEY – IT WAS THERE. THEY FAILED TO TREAT IT. THEY FAILED – THEY IGNORED IT. THEY DIDN'T DO ANYTHING WITH IT, AND THAT THAT WAS NEGLIGENT, AND THE SOLE THING SHOULD HAVE BEEN DONE WOULD HAVE BEEN THE REMOVAL OF THE VASCULAR RING, AND THEY WERE NEGLIGENT IN NOT SENDING THE CHILD OUT TO A CORRECT EXPERT WHO COULD PERFORM THE SURGERY. AND WHEN THEY DID, THEY PERFORMED THE SURGERY, AND THE SYMPTOMS WENT AWAY.

NOW, THAT'S WHAT THEY SHOULD HAVE DONE TWO-AND-A-HALF YEARS BEFORE, AND THAT'S WHAT DR. SCHWARTZ IS SAYING THEY SHOULD HAVE DONE TWO-AND-A-HALF YEARS BEFORE.

[25] THE COURT: IS THERE ANY INDICATION IN DR. SCHWARTZ'S AFFIDAVIT THAT HE DOES THE TYPE OF – WHAT IS REQUIRED OR HAS THE SKILL, THE TRAINING, OR EXPERTISE

TO DO THE TYPE OF DIAGNOSIS AND WORK THAT THE DEFENDANT PHYSICIANS HAVE IN THIS CASE?

MR. DAUGHERTY: JUDGE, THE THING ABOUT IT IS THIS, WHEN YOU HAVE A VASCULAR RING – AND YOU CAN GO GOGGLE IT. IT'S SO SIMPLE YOU CAN GOGGLE IT ON THE INTERNET, AND IT SAYS – WHEN IT TALKS ABOUT RIGHT AORTIC ABERRANT SUBCLAVIAN RING, WHICH MEANS – THAT'S ANOTHER LONG MEDICAL TERM FOR VASCULAR RING. THAT MEANS THERE'S A RING AROUND THE ESOPHAGUS WHERE IT WRAPS AROUND AND IS BASICALLY PUSHING TO THE LEFT.

NOW, IT SAYS THESE ARE THINGS YOU DO NOT DEVELOP, YOUR HONOR. THESE DOCTORS, THEY WERE – THIS IS A CONGENITAL SOMETHING THAT YOU ARE BORN WITH, AND WHEN YOU HAVE THESE – AND THE DATA IS ABSOLUTELY CLEAR – WHEN YOU HAVE A VASCULAR RING, WHERE YOU HAVE CHOKING OR UNABLE TO BREATHE, UNABLE TO SWALLOW, AND HOARSENESS, IN OTHER WORDS, WHEN THE BABY (DEMONSTRATING SOUND), THEY'RE BEING STRANGLED, AND ALSO EVEN REFLUX, YOU TAKE THE CHILD IMMEDIATELY WITH THOSE SYMPTOMS AND YOU DIVIDE THE VASCULAR RING. THERE'S NO IF'S, ANDS, OR BUT'S BECAUSE THERE IS NO OTHER TREATMENT OTHER THAN THE DIVISION OF THE VASCULAR RING, NONE.

[26] THAT'S WHAT ALL THE MEDICAL DATA DID, AND THIS CHILD HAD EVERY ONE OF THOSE SYMPTOMS, AND NONE OF THESE DOCTORS EVER REFERRED THIS CHILD OUT TO A PERSON WHO DEALS WITH VASCULAR RINGS, PERIOD.

AND THAT'S WHAT WE'RE HERE ABOUT IS THAT SIMPLY THAT ONCE IT GOT TO DR. KANTER, WHO IS A PEDIATRIC CARDIOTHORACIC SURGEON WHO DOES THE SAME SURGERY THAT DR. SCHWARTZ DOES, HE SAW THE CHILD, AND HIS TESTIMONY IS, AFTER THEY TOLD HIM ABOUT THE SYMPTOMS, HE SAID, WELL, YOU MAY HAVE A VASCULAR RING. LET'S ORDER A CT SCAN. IF YOU HAVE A VASCULAR RING, I THINK WE CAN – IF HE DOES, WE CAN REMOVE IT, AND IT GOES AWAY, AND HIS TESTIMONY, CLEAR IN THE DEPOSITION, IS HE ORDERED A CT SCAN. THEY SAID, THERE'S ALREADY A CT SCAN HERE, DOCTOR. WE DID THE CT SCAN TWO-AND-A-HALF YEARS AGO –

THE COURT: HE'S AN ORTHOPEDIC SURGEON?

MR. DAUGHERTY: HUH? NO, HE IS A THORACIC SURGEON.

THE COURT: THORACIC SURGEON.

MR. DAUGHERTY: PEDIATRIC – DOES THE SAME SURGICAL –

THE COURT: HE'S A SURGEON.

MR. DAUGHERTY: AND HE SAYS THERE'S ALREADY ONE, AND THERE IS A VASCULAR RING THERE, AND HE SAID – AND HE DIAGNOSED IT EVEN BEFORE HE ORDERED IT THAT I THINK YOU HAVE A VASCULAR RING, AND WHEN HE GOT THE TEST, WHICH WAS [27] DONE THREE YEARS – TWO-AND-A-HALF YEARS BEFORE, THEY IMMEDIATELY TOOK THE CHILD TO SURGERY AND REMOVED THE VASCULAR RING, AND THAT WAS THE END OF THE DEAL WITH THE CHILD.

HE HAD NO MORE SWALLOWING PROBLEMS. THEY REMOVED THE TUBE, AND IT ALL WENT AWAY, AND THIS KID LAID WITH A TRACHEOTOMY –

THE COURT: COUNSEL, I UNDERSTAND. OBVIOUSLY, IN ANY MEDICAL –

MR. DAUGHERTY: IT'S JUST LIKE THIS. I DON'T THINK YOU HAVE TO BE ABLE TO DO – I GO TO A DOCTOR AND THEY FIND I HAVE A CANCER ON ME. DO I HAVE TO GO TO A SPECIALIST TO SAY THAT THEY WERE NEGLIGENT IN NOT REFERRING IT OUT? I THINK ANY DOCTOR CAN SAY THAT IF YOU HAVE A CARCINOMA ON YOU THAT YOU NEED TO REFER IT TO SOMEONE TO TAKE CARE OF THE CARCINOMA.

THIS DOCTOR HERE, HE IS FAMILIAR WITH VASCULAR RINGS. HE WORKS WITH THESE PEOPLE. HE WORKS WITH THESE DOCTORS. HE PERFORMS THIS SURGERY. HE'S QUALIFIED

AND HAS BEEN DOING IT FOR 30 YEARS, AND HE TEACHES IT, AND THEY'RE SAYING THAT HE'S NOT QUALIFIED TO GIVE HIS OPINION IN THIS CASE THAT THE CHILD HAD A VASCULAR RING AND THAT THESE OTHER PROCEDURES – THESE WERE AS A RESULT OF A VASCULAR RING, AND IF YOU LOOK AT THIS CASE LAW I GAVE YOU, THE COURT OF APPEALS SAYS HE CAN. HE DOES NOT HAVE TO BE IN [28] THE SAME FIELD AS THE THEIR DOCTORS, AND IT UNEQUIVOCALLY SAYS THAT.

THE COURT: I DON'T BELIEVE THE DEFENDANTS CONTEND THAT HE HAS TO BE THE EXACT BOARD CERTIFIED SPECIALTY, BUT THE AFFIANT WOULD NEED TO AT LEAST HAVE THE SAME UNDERSTANDING, TRAINING, AND SKILL AS WHAT THE DEFENDANTS DO ON A REGULAR BASIS THAT THEY COULD BE SUED FOR.

MR. DAUGHERTY: AND THAT'S WHAT HE DOES. HE DEALS ON A REGULAR BASIS WITH THE ENT'S AND THE DOCTORS DEALING WITH VASCULAR RINGS. HE DOES IT AND DEALS WITH THESE PEOPLE, AND THESE PEOPLE, DR. KEYES AND THEM, THEY ARE PEOPLE WHO IN NEWBORN BABIES ARE SUPPOSED TO DISCOVER, REFER OUT FOR TREATMENT PEOPLE WITH VASCULAR RINGS, AND THEY DIDN'T DO IT.

AND IF THEY SAID – WELL, NO ONE HAS EVER BEEN ABLE TO SAY WHY THEY MISSED THE VASCULAR RING. THEY JUST MISDIAGNOSED IT OR THE HOSPITAL DIDN'T HAVE IT IN THE RECORD, ONE OR THE OTHER, BUT IT IS NEVER MENTIONED ANYWHERE BY THESE DOCTORS THAT THEY RULED OUT, THEY CONSIDERED, OR DID ANYTHING ABOUT THIS VASCULAR RING, AND IT'S UN – THERE'S NO DISPUTE THAT THE CHILD HAD IT.

THERE'S NO DISPUTE THAT HE HAD ALL THE PROBLEMS PRIOR TO THE FINDING OF THE VASCULAR RING THAT REQUIRED SURGERY FOR A VASCULAR RING, AND IF YOU HAVE THOSE, THERE – IT'S LIKE PLAYING MONOPOLY. YOU DO NOT PASS GO. YOU GO [29] DIRECTLY TO SURGERY. YOU GO DIRECTLY TO REMOVE THE VASCULAR RING. YOU DO NOT PASS GO, AND YOU DO NOT COLLECT $200.

THEY IGNORED THAT. THEY DID NOT GET IT TO ANYONE TO ADDRESS THE VASCULAR RING, AND THAT'S WHY WE'RE HERE TODAY, AND HE HAS THE EXPERTISE TO TESTIFY ABOUT THAT, AND I THINK THAT'S ALL WE GOT TO DO TO SHOW THAT HE HAS IT; THAT HE WORKS WITH THESE PEOPLE; HE DEALS WITH THIS; HE HAS KNOWLEDGE OF WHAT THESE PEOPLE DO; AND THAT HE'S ABLE TO TESTIFY ABOUT WHAT THE PROBLEM WAS THAT WAS CAUSING THIS BABY'S PROBLEM AND HAS THE

EXPERTISE AS TO WHAT SHOULD HAVE BEEN DONE.

THE COURT: HAS DR. SCHWARTZ BEEN DEPOSED?

MR. DAUGHERTY: NO, THEY HAVEN'T. WE HAVE – AS I SAID, WE DID DEPOSE THE DEPOSITION OF DR. KANTER. THAT WAS THE DOCTOR HERE AT EGLESTON THAT ACTUALLY TESTIFIED AGAINST THESE OTHER DOCTORS AND SAID THIS CHILD SHOULD HAVE NEVER HAD THIS TRACH IN. AS SOON AS THEY FOUND THAT VASCULAR RING, THEY SHOULD HAVE IMMEDIATELY REMOVED THAT VASCULAR RING AND HIS TRACH COULD HAVE BEEN TAKEN OUT TWO-AND-A-HALF YEARS AGO. THEY IGNORED IT, AND DIDN'T DO IT, AND THAT SHOULD HAVE BEEN DONE.

HE'S ALREADY TESTIFIED ABOUT THAT, JUDGE. WE TOOK HIS DEPOSITION, AND HE'S ALREADY TESTIFIED ABOUT THAT UNEQUIVOCALLY, AND HE TEACHES AT EMORY, AND HE'S – HE'S [30] GIVEN THAT OPINION, AND HE'S COME FORWARD AGAINST THESE – AND HE SAID THAT. WE HAVE HIS DEPOSITION. SO HE ESSENTIALLY SAYS PRETTY MUCH THE SAME THING AS

DR. SCHWARTZ SAYS, IS THAT I'M A VASCULAR SURGEON. I DEAL WITH VASCULAR RINGS. THEY HAVE THESE PROBLEMS. THEY DEAL WITH THESE PEOPLE'S – HE SHOULD HAVE

GOTTEN THIS OVER EITHER TO DR. KANTER OR SOMEBODY LIKE DR. SCHWARTZ AND THE VASCULAR RING SHOULD HAVE BEEN REMOVED. THAT'S WHAT THEY'RE TESTIFYING ABOUT, AND THAT'S WHAT DR. SCHWARTZ IS TESTIFYING ABOUT.

WE'RE NOT GOING INTO DID THEY NEGLIGENTLY PERFORM A SCOPE. DID THEY NEGLIGENTLY DO ANYTHING. WE'RE NOT GOING INTO ANY OF THAT. THERE'S NOT ANYTHING TESTIFYING ABOUT ANY NEGLIGENT PROCEDURE OF THESE DOCTORS.

WHAT WE'RE TALKING ABOUT IS THE FACT THAT THESE DOCTORS HAD AN ABSOLUTE PROBLEM. THEY DID PROCEDURES THAT WERE NOT NECESSARY BECAUSE THESE WERE FROM – WERE CLEARLY FROM A VASCULAR RING. THEY DIDN'T DO ANY TREATMENT. THEY TIED OFF SALIVARY GLANDS TO –

THE COURT: COUNSEL, I JUST REALLY NEED TO HEAR AS TO THE EXPERT AFFIDAVIT ISSUE. I UNDERSTAND –

MR. DAUGHERTY: I UNDERSTAND THAT, BUT WHAT I'M TRYING TO SAY, AND HE HAS – I MEAN I DON'T KNOW, I THINK FOR TEACHING AND WORKING WITH THESE DOCTORS AND PERFORMING THIS SURGERY FOR 30 YEARS MAKES HIM – AND TEACHING AS A [31] PROFESSOR MAKES HIM QUALIFIED, FAR EXCEEDS THE DALBERT OR ANYTHING AND MAKES HIM

QUALIFIED TO GIVE HIS OPINION IN THIS CASE ABOUT VASCULAR RINGS, AND THIS IS ABOUT VASCULAR RINGS AND COMPLICATIONS AND PROBLEMS THAT WERE CAUSED FOR THE FAILURE TO TREAT AND SEND UP A DIAGNOSIS OF VASCULAR RING. THAT'S WHAT THIS CASE IS ABOUT, PERIOD.

THE COURT: THANK YOU, COUNSEL.

MS. KRIVITSKY: YOUR HONOR, MAY I ADD SOMETHING, PLEASE?

MR. DAUGHERTY: SHE'S THE BRAIN.

MS. KRIVITSKY: NO, NOT AT ALL. I KNOW I BLURTED SOMETHING OUT EARLIER, SO I APOLOGIZE TO THE COURT, BUT IS IT OKAY IF I ADD?

THE COURT: WOULD YOU TELL ME WHO YOU ARE, PLEASE.

MS. KRIVITSKY: SURE. MY NAME IS ALINA KRIVITSKY, AND I'M ALSO HERE WITH MR. DAUGHERTY ON BEHALF OF THE PLAINTIFFS.

THE COURT: ALL RIGHT.

MS. KRIVITSKY: AND I JUST WANTED TO TALK A LITTLE BIT MORE ABOUT THE *COTTEN V. PHILLIPS* CASE AND TO QUOTE DIRECTLY FROM IT.

THE COURT FOUND THAT A MEDICAL DOCTOR – THIS IS SPECIFICALLY IN THE LANGUAGE OF THE CASE – A MEDICAL DOCTOR BELONGING TO SPECIALTY-A CAN RENDER AN OPINION ABOUT THE ACTS OR OMISSIONS OF ANOTHER DOCTOR BELONGING TO [32] SPECIALTY-B, SO LONG AS THE OPINION OF THE EXPERT WITNESS BELONGING TO SPECIALTY-A PERTAINS TO SPECIALTY-A. SO THE ONLY ISSUE IS WHETHER THE OPINION OF DR. SCHWARTZ, WHO BELONGS TO THE SPECIALTY OF PEDIATRIC SURGERY, PERTAINS TO PEDIATRIC SURGERY, AND IF YOU LOOK AT HIS OPINION AND IF YOU LOOK AT THE ACTS OF NEGLIGENCE THAT HE TESTIFIES TO, THE ONLY THING THAT HE TALKS ABOUT IS THE VASCULAR RING AND THE MISDIAGNOSIS OF THE VASCULAR RING. HE DOES NOT GO INTO ANYTHING ELSE ASIDE FROM THAT ISSUE. THAT IS THE ONLY ISSUE THAT HE TALKS ABOUT IN HIS ENTIRE OPINION.

SO THE QUESTION IS WHETHER OR NOT HIS EXPERTISE IN PEDIATRIC SURGERY PERTAINS TO THE ISSUE OF VASCULAR RING. WHEN WE FILED OUR SUPPLEMENTAL AFFIDAVIT, HE TALKED ABOUT – I DON'T HAVE IT IN FRONT OF ME, BUT THE LANGUAGE OF HIS SUPPLEMENTAL AFFIDAVIT SAID –

MR. DAUGHERTY: HERE IT IS.

MS. KRIVITSKY: THANK YOU. HE SAID, AS A BOARD CERTIFIED PEDIATRIC SURGEON, I HAVE THE TRAINING, KNOWLEDGE, AND EXPERIENCE TO DIAGNOSE AND SURGICALLY MANAGE CHILDREN WITH VASCULAR RINGS, WHICH IS THE MEDICAL CONDITION AT ISSUE IN THIS CASE.

THAT'S THE ONLY QUESTION. IS HE QUALIFIED TO TALK ABOUT VASCULAR RING? YES. AS A PEDIATRIC SURGEON, HE IS QUALIFIED TO TALKED [sic] ABOUT VASCULAR RING. THE ISSUE IS NOT [33] WHETHER, AS A PEDIATRIC SURGEON, HE IS QUALIFIED TO TALK ABOUT NEONATOLOGY OR QUALIFIED TO TALK ABOUT OTOLARYNGOLOGY; IT IS, IS HE QUALIFIED TO TALK ABOUT VASCULAR RING. THE ANSWER IS, YES.

I THINK THE OTHER CASE, I DON'T HAVE IT IN FRONT OF ME, THE NAME OF IT, BUT THERE'S ANOTHER CASE THAT CAME OUT YESTERDAY THAT I THINK WE GAVE TO YOU AS WELL.

THE COURT: THANK YOU, COUNSEL.

ANYTHING FURTHER ON BEHALF OF THE PLAINTIFF? ANY REBUTTAL?

MR. TANNER: YES, YOUR HONOR, VERY BRIEFLY. FIRST, TO ADDRESS THESE TWO CASES THAT WE'VE TALKED ABOUT, THE *COTTEN* CASE AND THE NEW ONE YESTERDAY. THE *COTTEN* CASE, I WOULD POINT OUT TO THE

COURT, WAS NOT AN AFFIDAVIT CASE. THE *COTTEN* CASE WAS A MOTION IN LIMINE THAT WAS FILED, I ASSUME IT WAS SHORTLY BEFORE TRIAL, BECAUSE THE CASE CAME OUT JUST RECENTLY IN 2006, AND THE NEGLIGENT SURGERY ALLEGEDLY HAPPENED IN 1999.

SO WE'RE CLEARLY DEALING WITH A DIFFERENT ISSUE THERE, AND THAT'S WHY I WENT OUT OF MY WAY IN THE BEGINNING TO SAY WE'VE GOT TO REMEMBER WE'RE DEALING WITH THE AFFIDAVIT STATUTE HERE. THE AFFIDAVIT SAYS YOU HAVE TO HAVE THE KNOWLEDGE TO TALK ABOUT VIOLATION OF THE STANDARD OF CARE.

WHAT THEY WANTED TO TALK ABOUT IN THE *COTTEN* CASE MAY [34] HAVE BEEN RELEVANT TO SOME OTHER ISSUE, AND, IN FACT, I BELIEVE THE *COTTEN* CASE REALLY SUPPORTS MY VIEW OF THIS BECAUSE IT SPECIFICALLY SAYS, TALKING ABOUT DR. PHILLIPS, WHO WAS NOT OF THE SAME SPECIALTY AS DR. COTTEN, QUOTE, IT DOES NOT APPEAR FROM THE EVIDENCE IN THE RECORD THAT PHILLIPS EVER ALLEGED THAT COTTEN WAS NEGLIGENT IN HIS PERFORMANCE OF THE TOTAL KNEE REPLACEMENT SURGERY.

SO APPARENTLY THIS ONE DOCTOR WASN'T EVEN GOING TO TALK ABOUT THE SPECIFIC ACT OF NEGLIGENCE THAT WAS OR WAS NOT

PRESENT, AS YOU WOULD NEED IN AN AFFIDAVIT. SO IT'S DISTINGUISHABLE.

THE NEW CASE, THE ONE FROM YESTERDAY, I BELIEVE, AND I'VE ONLY SKIMMED IT, BUT I BELIEVE THAT'S A SPINAL SURGERY CASE, AND YOU HAVE TWO PHYSICIANS WHO ARE SURGEONS, ONE AN ORTHOPEDIST AND ONE A NEUROSURGEON, I BELIEVE, AND THEY BOTH PERFORMED SURGERY ON THE SPINE.

SO IF I'M CORRECT ABOUT THAT, WHAT WE CAN TAKE FROM THOSE TWO CASES IS THERE IS CERTAINLY NO BRIGHT LINE THAT SAYS IF YOU WANT TO CRITICIZE A NEONATOLOGIST, YOU HAVE TO BE A NEONATOLOGIST. WE ACCEPT THAT. SO IF THAT'S WHAT THE PLAINTIFFS' ARGUMENT IS, THAT'S TRUE.

WHERE THEY DON'T MEET THEIR BURDEN IS ON THE ABILITY TO SAY WHAT THE STATUTE REQUIRES THAT THEY SHOW IS THEY HAVE KNOWLEDGE OF WHAT THE DEFENDANT DOES WITHIN THE DEFENDANT'S NORMAL PRACTICE SUCH THAT THEY CAN SAY THAT [35] THE DEFENDANT WAS OUTSIDE OF THE USUAL CUSTOMARY PRACTICE UNDER THE LIKE OR SURROUNDING CIRCUMSTANCE FOR THAT PRACTICE.

AND I THINK MR. DAUGHERTY, IN ONE OF HIS COMMENTS, ACTUALLY MADE MY POINT FOR ME. HE SAID THAT THIS CASE IS ABOUT A FAILURE TO DIAGNOSE A VASCULAR RING. I

BELIEVE I'M QUOTING YOU PRETTY CLOSELY, QUOTE, THEY, MEANING THE DEFENDANT DOCTORS, ARE SUPPOSED TO REFER THEM OVER TO HIM, MEANING THE SURGEON, WHENEVER THEY FIND A VASCULAR RING, END QUOTE. AND THAT'S THE ESSENCE OF WHAT DR. SCHWARTZ IS SAYING. HE SAYS, YES, THEY'RE SUPPOSED TO SEND ME THESE VASCULAR RINGS WHEN THEY FIND THEM.

WHAT IS MISSING AND WHY I BELIEVE THE MOTION IS SOLID IS THAT WE DON'T HAVE AN EXPERT COMPETENT TO TESTIFY THAT UNDER THE LIKE SURROUNDING CIRCUMSTANCES OF THIS CASE, A NEONATOLOGIST FACING THE ENTIRE CONSTELLATION OF SYMPTOMS THAT THE PATIENT PRESENTED WOULD BE EXPECTED TO SORT THROUGH ALL THE THINGS GOING ON WITH THIS CHILD AND COME TO THIS DIAGNOSIS THAT THAT SPECIALTY WOULD BE EXPECTED TO HAVE THAT KNOWLEDGE TO MAKE THAT CALL. THAT'S WHAT DR. SCHWARTZ DOES NOT DEFINE THAT HE HIMSELF HAS THE BACKGROUND AND EXPERTISE TO SAY. THAT'S WHAT'S MISSING, AND IT'S ON THAT BASIS THAT I BELIEVE THAT THE MOTION SHOULD BE GRANTED.

I WOULD POINT OUT ONLY ONE OTHER THING. [36] MR. DAUGHTERTY INDICATED THAT THE DEFENDANTS ADMITTED THAT THEY KNEW THERE WAS A VASCULAR RING. THE RECORD IS SIMPLY NOT ACCURATE ON

THAT. THE DEFENDANTS THAT I REPRESENT NEVER ADMITTED THAT THEY KNEW THERE WAS A VASCULAR RING. IF SOMEONE HANDS YOU A DIAGNOSIS, THEN IT'S NOT THAT HARD TO SEND THEM OVER TO ANOTHER SPECIALIST.

IN THE CANCER ANALOGY MR. DAUGHTERTY GAVE, I THINK THAT'S TRUE. ANY DOCTOR WHO IS TOLD YOU GOT CANCER WILL SAY, GO TO THE CANCER DOCTOR. THE QUESTION IS, ARE YOU SUPPOSED TO, IF YOU ARE A GENERAL PRACTITIONER, FIGURE OUT THAT THERE'S CANCER THERE? AND BY ANALOGY, THE SAME SITUATION IN OUR CASE, IF YOU ARE A NEONATOLOGIST, ARE YOU SUPPOSED TO FIGURE OUT THAT THERE'S A VASCULAR RING FROM THE SYMPTOMS THAT YOU'VE GOT ON A COMPLEX CASE?

I SUBMIT THAT DR. SCHWARTZ HAS NOT SHOWN HIMSELF SUFFICIENTLY KNOWLEDGEABLE ABOUT THE PRACTICE OF MEDICINE FROM THAT STANDPOINT TO MAKE THAT CALL. THANK YOU, YOUR HONOR.

THE COURT: THANK YOU, COUNSEL.

MS. COTY: YOUR HONOR, MR. DAUGHTERTY SAID A LOT IN ADDRESSING THE COURT, SOME OF WHICH, FROM OUR PERSPECTIVE, CERTAINLY MISREPRESENTED SOME OF THE TESTIMONY GIVEN TO DATE. BECAUSE MUCH OF WHAT HE SAID IS NOT RELATED TO THE

MOTION TO DISMISS OR DR. SCHWARTZ'S QUALIFICATIONS, I HOPE, IN MY REBUTTAL, TO REALLY FOCUS ONLY ON WHAT IT IS [37] THAT HE SAID THAT REALLY IS RELEVANT TO THE MOTION THAT'S CURRENTLY BEFORE THE COURT.

IN TERMS OF THE CASES THAT WERE CITED BY PLAINTIFFS' COUNSEL, IT REALLY DOESN'T SHED LIGHT ON OR REPRESENT ANYTHING DIFFERENT THAN WHAT'S ALREADY BEFORE THE COURT BECAUSE IT DOESN'T CHANGE THE FACT THAT IN THE CASES CITED, JUST AS IN PREVIOUS CASES, IT MAKES CLEAR THAT IF SOMEONE IS FROM A DIFFERENT SPECIALTY THAT THERE HAS TO BE OVERLAP IN THE TREATMENT OF THE CONDITION IN ORDER FOR THE EXPERT FROM ONE PROFESSION OR ONE SPECIALTY TO BE COMPETENT TO TESTIFY ABOUT AN EXPERT FROM ANOTHER SPECIALTY, AND THAT'S EXACTLY THE SAME IN TERMS OF WHAT WAS SET FORTH IN THE *BENNETT VS. BUTLIN* CASE AND THE *SANFORD VS. HOWARD* CASE.

SO, REALLY, THE *COTTEN* CASE AND THE NEW CASE, I BELIEVE IT WAS *ABRAMSON*, THAT CAME OUT YESTERDAY, IT REALLY SIMPLY EXPANDS ON THAT AND SETS FORTH THE SAME PROPOSITION THAT'S ALWAYS EXISTED AND DOESN'T CHANGE THE FACT THAT DR. SCHWARTZ DOES NOT HAVE THE KNOWLEDGE AND EXPERIENCE TO BE ABLE TO SAY WHAT A

PEDIATRIC OTOLARYNGOLOGIST DOES ON A DAY-TO-DAY BASIS OR TO COMMENT ON WHETHER OR NOT WHAT THEY DID WAS NEGLIGENT.

AND, LIKEWISE, IN TERMS OF THE STATUTE THAT'S AT ISSUE, IT MAKES VERY CLEAR THAT IN TERMS OF THE REQUIREMENTS OF AN AFFIDAVIT THAT THE PLAINTIFFS MUST [38] DEMONSTRATE THAT THEIR AFFIANT HAS ACTUAL KNOWLEDGE AND EXPERIENCE IN TERMS OF THE ACTUAL PROCEDURES AND TREATMENT THAT'S AT ISSUE IN THE CASE.

THIS ISSUE – THE CASE AT HAND IS NOT JUST ABOUT VASCULAR RINGS, BUT IF YOU ARE SAYING THAT A PROCEDURE WAS NOT NECESSARY BECAUSE OF THE PRESENCE OR AN ABSENCE OF A VASCULAR RING OR BECAUSE A VASCULAR RING WAS OR WAS NOT SYMPTOMATIC, THEN YOU MUST ROUTINELY ASSESS, DIAGNOSE, AND TREAT THOSE VERY ISSUES IN ORDER TO BE ABLE TO SAY THAT THOSE PROCEDURES SHOULD NOT HAVE BEEN PERFORMED AND THAT IT WAS NEGLIGENT TO PERFORM THEM.

I NOTED THAT MR. DAUGHTERTY [sic] SAID THAT DR. SCHWARTZ WORKS WITH ENT'S. THERE'S A REASON THAT HE WORKS WITH ENT'S AND THAT'S BECAUSE HE'S NOT AN ENT.

IF HE HAD THE CREDENTIALS, THE EXPERIENCE, THE COMPETENCY TO DO ALL OF

THE THINGS THAT ENT'S OR PEDIATRIC OTOLARYNGOLOGISTS DO, HE WOULDN'T NEED TO WORK WITH ENT'S, BECAUSE HE WOULD BE ABLE TO BE OUT THERE PERFORMING THOSE PROCEDURES HIMSELF; BUT, IN FACT, THEY'RE SEPARATE AND DISTINCT AREAS WITH DIFFERENT TRAINING, DIFFERENT QUALIFICATIONS WHERE THEY PERFORM DIFFERENT PROCEDURES AND DIFFERENT TREATMENTS.

THE OTHER THING THAT I NOTED WAS THAT DR. SCHWARTZ AND HIS AFFIDAVIT COMMENTS ON THE FACT THAT HE DOES SURGERY ON VASCULAR RINGS AFTER THE FACT, AFTER THE [39] DIAGNOSIS. DR. SCHWARTZ DOESN'T ASSESS, DIAGNOSE COMPLEX AIRWAYS, WHICH IS WHAT THE ISSUE IS IN THIS CASE; WAS THE COMPLEX AIRWAY OBSTRUCTION OF N.S. APPROPRIATELY ASSESSED, DIAGNOSED, AND TREATED, AND THAT'S NOT WHAT DR. SCHWARTZ DOES.

WHAT HAPPENS IS THE PEDIATRIC OTOLARYNGOLOGIST IS OUT ASSESSING THESE THINGS. DR. SCHWARTZ COMES IN AFTER THE FACT. HE COMES IN ONCE SOMEBODY LIKE MY CLIENT REFERS A PATIENT OVER TO HIM FOR DIVISION OF A VASCULAR RING. MY CLIENTS, DR. GOWER AND DR. THOMSEN, ASSESS WHETHER A VASCULAR RING IS OBSTRUCTIVE OR SYMPTOMATIC. THEY ASSESS WHAT IS THE CAUSE OF AN AIRWAY OBSTRUCTION IN A

COMPLEX AIRWAY OF AN INFANT THE AGE OF N.S.

DR. SCHWARTZ IS NOT IN THAT ROLE, AND HE'S NEVER STOOD IN THE SHOES OF DR. GOWER OR DR. THOMSEN IN TERMS OF ASSESSING, DIAGNOSING, AND TREATING OBSTRUCTIVE AIRWAY DISORDERS, AND FOR THAT REASON, WE WOULD SUBMIT THAT DR. SCHWARTZ IS NOT QUALIFIED TO PROVIDE EXPERT TESTIMONY AGAINST DR. GOWER AND DR. THOMSEN AND THAT PLAINTIFFS' AFFIDAVIT IS INSUFFICIENT.

THE COURT: THANK YOU, COUNSEL.

MR. DAUGHERTY: THAT'S NOT WHAT HE SAID IN HIS AFFIDAVIT, JUDGE, IF YOU'LL READ HIS AFFIDAVIT. HE DOES DIAGNOSE AND TREAT VASCULAR RINGS HIMSELF. I JUST WANT TO PUT THAT OUT. CONTRARY TO WHAT THEY SAY, HE DOES DIAGNOSE [40] HIMSELF AND TREAT THEM.

THE COURT: IS THERE ANYTHING FURTHER THE PLAINTIFF WISHES TO PUT BEFORE THE COURT AS TO THE ISSUE ON WHETHER THE EXPERT IS COMPETENT TO TESTIFY FROM THE AFFIDAVIT?

MS. KRIVITSKY: I HAVE ONE MORE THING I WANTED TO ADD.

THE COURT: ALL RIGHT.

MS. KRIVITSKY: MS. COTY MENTIONED THAT, I THINK, TWO CASES THAT TALK ABOUT THAT THERE HAS TO BE AN OVERLAP BETWEEN THE TWO DIFFERENT SCHOOLS OF MEDICINE IN ORDER FOR THE EXPERT TO BE QUALIFIED TO RENDER AN OPINION AGAINST THE NEGLIGENT DOCTOR, AND ALTHOUGH I DISAGREE WITH HER READING OF THE CASES, IN LIGHT OF THE NEWLY-AMENDED STATUTE AND THE INTERPRETATION OF THAT STATUTE, I WILL SAY THAT THE OVERLAP BETWEEN THESE TWO AREAS – THESE TWO SCHOOLS OF MEDICINE, THERE IS AN OVERLAP AS IT PERTAINS TO THIS CASE BECAUSE THE METHOD OF TREATMENT IS EXACTLY THE SAME. THAT IS THE KEY. THE METHOD OF TREATMENT IS SAME.

THERE'S ONLY ONE METHOD OF TREATMENT. YOU REFER THE CHILD TO SURGERY BECAUSE THE VASCULAR RING HAS TO BE SURGICALLY DIVIDED. THAT'S IT. THERE ARE NOT TEN DIFFERENT WAYS TO TREAT IT. THERE'S NO MEDICINE. THERE'S ONLY SURGERY. AND WHAT WE'RE SAYING THAT THEY DID WRONG IS THEY DID NOT REFER HIM OUT TO TREATMENT. THEY DID NOT REFER HIM TO A SURGEON. [41] THE CHILD'S VASCULAR RING WASN'T DIVIDED UNTIL HE WAS TWO-AND-A-HALF YEARS OLD, BUT BECAUSE THE METHOD OF TREATMENT IS THE SAME BETWEEN THE TWO SCHOOLS OF MEDICINE, THERE IS AN

OVERLAP SUFFICIENTLY TO RENDER OUR EXPERT QUALIFIED TO GIVE THIS OPINION EITHER UNDER THE CASES THAT SHE CITED, UNDER THE NEW CASES THAT WE CITED, UNDER 24-9-67.1, UNDER 9-11-9.1. IT DOESN'T MATTER. EITHER WAY YOU INTERPRET IT, OUR EXPERT IS QUALIFIED.

THE COURT: THANK YOU, COUNSEL,

IS THERE ANYTHING FURTHER PLAINTIFF NEEDS TO PRESENT IN TERMS OF THE EXPERT AFFIDAVIT ISSUE?

MR. DAUGHERTY: I PRESUME THAT YOU DID – UNDER THE CASE LAW, YOU DID ACCEPT AND REVIEW IT AND CONSIDER IT, I WOULD PRESUME, BECAUSE THEY SAID WE COULD. I JUST WANT – THAT YOU DID DO THAT, BECAUSE THE COURT SAYS WE COULD FILE SUBSTANTIVE PROOF FOR AN AFFIDAVIT. UNDER THAT CASE, WE DID DO IT, YOU DO HAVE IT, AND I PRESUME YOU DID ACCEPT IT.

THE COURT: WE DO HAVE YOUR MOTION TO SUPPLEMENT THE AFFIDAVIT.

MR. DAUGHERTY: I PRESUME YOU ARE CONSIDERING THAT IN THIS HEARING. THAT'S ALL –

THE COURT: I HAVE IT IN THE FILE FOR CONSIDERATION IN CONNECTION WITH THE MOTION TO DISMISS.

MR. DAUGHERTY: THANK YOU, MA'AM, APPRECIATE IT.

[42] THE COURT: ANYTHING FURTHER ON BEHALF OF THE DEFENDANTS?

MR. TANNER: NO, YOUR HONOR.

MS. COTY: NO, YOUR HONOR.

THE COURT: LADIES AND GENTLEMEN, OBVIOUSLY, I NEED SOME TIME TO REVIEW YOUR ARGUMENT AND THE FILE, AND WE WILL TAKE THE MATTER UNDER ADVISEMENT AND GIVE YOU A DECISION AS SOON AS POSSIBLE.

MR. DAUGHERTY: THANK YOU.

* * *

CERTIFICATE

STATE OF GEORGIA,

COUNTY OF DEKALB:

I DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS TAKEN DOWN BY ME IN THE CASE AFORESAID. THIS CERTIFICATION IS EXPRESSLY WITHDRAWN AND DENIED UPON THE DISASSEMBLY OR PHOTOCOPYING OF THE FOREGOING TRANSCRIPT, OR ANY PART THEREOF, UNLESS SAID DISASSEMBLY OR PHOTOCOPYING IS DONE BY THE UNDERSIGNED CERTIFIED COURT REPORTER AND

ORIGINAL SIGNATURE AND SEAL IS ATTACHED THERETO.

THIS, THE 16TH DAY OF MARCH, 2007.

/s/ D. Karampelas
DIANNE M. KARAMPELAS
CERTIFIED COURT
REPORTER
B-1975